99TH CONGRESS
2d Session

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NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

REPORT

FROM THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

TOGETHER WITH

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

SEPTEMBER 8, 1986.—Ordered to be printed

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Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

The Committee on the Judiciary, to which was referred the nomination of Justice William H. Rehnquist, of Virginia, to be Chief Justice of the United States, having considered the same, by a vote of 13 yeas and 5 nays, reports favorably thereon with the recommendation that the nomination be confirmed.

BACKGROUND

The Committee received the President's nomination of Justice William H. Rehnquist for the position of Chief Justice of the United States on June 20, 1986. In accordance with a Committee agreement, the hearing on Justice Rehnquist's nomination was scheduled for July 29, 1986. Also by agreement, the Committee vote on the nomination took place on August 14, 1986.

The Judiciary Committee carefully and thoroughly scrutinized the nominee's qualifications, credentials, and 15 years' experience as an Associate Justice of the U.S. Supreme Court. The hearings on Justice Rehnquist's nomination were held on July 29, 30, 31, and August 1, 1986. Senators Dole (R-KS), Warner (R-VA), Trible (R-VA), Goldwater (R-AZ), DeConcini (D-AZ), and Stevens (R-AK) introduced and strongly endorsed Justice Rehnquist's nomination. The 4 days of hearings lasted approximately 40 hours and during that time the Committee heard from more than 40 witnesses. The Rehnquist nomination is distinctive when comparing the interval between Senate receipt of the nomination and the start of Commit-

tee hearings. Thirty-nine days elapsed before the Rehnquist hearing started, which was more than any other Supreme Court nominee during the period from 1961 until 1986.

QUALIFICATIONS

Justice Rehnquist was born October 1, 1924, in Milwaukee, WI, and attended elementary and high schools in Shorewood, WI. He attended Kenyon College in Gambier, OH, for a short time and then enlisted in the U.S. Army in 1943. He served as a weather observer until 1946 when he was honorably discharged. Following military service he attended Stanford University and was elected to the National Scholastic Honor Society, Phi Beta Kappa. He attended Harvard University receiving a master of arts degree in history. Justice Rehnquist then entered Stanford University Law School. He graduated first in his class and was a member of the board of editors of the Stanford Law Review. He was also elected to the Order of the Coif, a national honor society. Following his graduation from law school, Justice Rehnquist served as a law clerk to U.S. Supreme Court Justice Robert H. Jackson from February 1952 until June 1953.

From 1953 to 1969 he was in the private practice of law in Phoenix, AZ. He practiced with the firm of Evans, Hull, Kitchel & Jenckes until 1955. He then became a partner in the firm of Ragan & Rehnquist. In 1957 he was a partner in the firm of Cunningham, Carson & Messenger, until joining the firm of Powers & Rehnquist as a partner in 1960. He practiced law in Phoenix until he became the Assistant Attorney General, Office of Legal Counsel, Department of Justice, in 1969. During his years of legal practice Justice Rehnquist served at various times as the president and member of the board of directors of the Maricopa County Bar Association. He was also chairman of the Arizona State Bar Continuing Legal Education Committee and was a member of the National Conference of Commissioners of Uniform State Laws. He also served on the council of the administrative law section of the American Bar Association.

In 1971 he was nominated to be an Associate Justice of the U.S. Supreme Court and was confirmed by the full Senate in December of that year. Justice Rehnquist has served with distinction as an Associate Justice since that time.

AMERICAN BAR ASSOCIATION

The American Bar Association's Standing Committee on Federal Judiciary found Justice Rehnquist to be well qualified and so informed the Judiciary Committee:

> The Committee unanimously has found that Justice Rehnquist meets the highest standards of professional competence, judicial temperament and integrity, is among the best available for appointment as Chief Justice of the United States, and is entitled to the Committee's highest evaluation of the nominees to the Supreme Court—well qualified.

The extensive investigation by the America Bar Association committee provides a significant basis supporting the association's unanimous findings and its granting of the highest evalution possible to the nominee. In their investigation, the ABA committee interviewed all of the current Associate Justices of the Supreme Court, and more than 180 Federal and State judges. Members of the Judiciary who know him describe Justice Rehnquist as a "true scholar, collegial, genial and low key . . . unbelievably brilliant . . . a very capable individual in every respect." More significantly, according to the ABA, Justice Rehnquist enjoys the respect and esteem of his colleagues on the Court.

The ABA committee also interviewed approximately 65 practicing attorneys throughout the United States. These attorneys, including some who disagree with him politically and philosophically, spoke of warm admiration for him and described him as "very talented . . . a bright and able man . . . always well prepared . . . one who brings out the best in people, and will facilitate the work of the Court." Additionally, the ABA committee interviewed more than 50 deans and faculty members of a number of law schools across the country. The ABA stated that many of these individuals spoke highly of his writing and analytical ability and the vast majority had strong praise for his professional qualifications. Finally, the ABA committee had approximately 200 of Justice Rehnquist's opinions examined, and it was concluded that his legal analysis and writing ability were of the "highest quality."

Other Remarks

At the Committee hearings a number of very prominent individuals testified on behalf of Justice Rehnquist. These individuals warmly and wholeheartedly endorsed the nomination of Justice Rehnquist. For example, at the July 29, 1986, hearing, Judge Griffin Bell, former Attorney General, during the Carter administration, stated:

> I think he has to be tested to see if he possesses integrity, ability, leadership capacity, intellectual attainment, and good health; and on top of that, I would want to be certain that he had a modicum of common sense. It seems to me that he meets all of these standards and the President's nominee for Chief Justice should not be rejected. He has a public record of 15 years on the Court, and I think his record supports that same conclusion. Were I a Senator, I would vote to confirm Justice Rehnquist as Chief Justice. I would do so with a decided view that he would serve our Supreme Court and our country well.

Erwin N. Griswold, former Solicitor General under President Johnson, who testified on behalf of Justice Rehnquist at the July 31, 1986, hearing, stated:

> I have also appeared before him a good many times . . . and because of my 33 years of academic career, I have been quite a student of the Supreme Court over the past good many years, including the current Court. I have read the opinions. I think Justice Rehnquists' opinions are

> able, lawyer-like, important contributions to our constitutional and other law. In my opinion, he is extremely well qualified to be Chief Justice, and I am very glad to have the privilege of appearing here in support of the nomination.

In a letter to the Committee, former Attorney General William French Smith wrote:

> Throughout his career William Rehnquist has demonstrated that he is a man of integrity and character. He is an outstanding Associate Justice of the Supreme Court and a true scholar, where depth of knowledge, perception, and devotion to constitutional government are clearly demonstrated in his opinions. He will be an outstanding Chief Justice . . . Justice Rehnquist's philosophy reflects a committment to the Constitution. His opinions demonstrate a respect for democratic government, the constitutional framework of separation of powers, and the appropriate authority of the States. He has made an impressive and important contribution to the Court and will certainly continue to do so.

Dean Gerhard Casper of the University of Chicago Law School wrote as follows:

> Justice Rehnquist, in terms of abilities, temperament, and administrative experience, is well qualified to take on these tasks. I have known Justice Rehnquist personally for about 7 years and I have been greatly impressed by his capacity to deal with people and problems in a low-keyed, friendly, and effective manner. Justice Rehnquist is well versed in the institutional history of the Supreme Court and cares about the Court's role in American life. While the Justice and I disagree on a fair number of substantive issues, these disagreements have never prevented me from appreciating Justice Rehnquist's great abilities as a lawyer. I would expect him to go about the tasks of the Chief Justice with true concern for the demands of the position.

The preceding remarks presented to the Committee concerning Justice Rehnquist's qualifications, experience, and integrity are but a few examples of the diverse support that he received from members of the legal profession.

Alleged Incident at Phoenix Polling Place

The allegation that Justice Rehnquist challenged or harassed minority voters at the polling place in Phoenix, Arizona, during the 1960's again found itself an issue during the confirmation hearings in 1986. Similar allegations were raised in 1971 during his consideration for the position of Associate Justice. It should be noted at this juncture that the challenging of voters in Arizona at the time was a lawful election procedure. A challenger was an individual legally appointed as a representative by both Republican and Democratic parties. The primary duty of a challenger was to observe for irregu-

larities at the polling place. The conclusion taken by the Committee in 1971 was that the allegations had been thoroughly investigated and found "to be wholly unsubstantiated" and viewed in its entirety, the Committee felt that the incident suggested at the very most a case of mistaken identity.

The allegation of voter harrassment was originally made by the Southwest Conference of the NAACP in a resolution presented for the record at Justice Rehnquist's hearing in 1971. This resolution alleged that he had harassed black voters in 1968. In 1971, Justice Rehnquist categorically denied this charge and stated that he had nothing to do with polling activities in 1968.

At the same time in 1971 it was alleged by two witnesses before the Committee that Justice Rehnquist had engaged in voter harassment in Phoenix, AZ, in 1962. There was in fact an incident of voter harassment at the Bethune polling place in Phoenix, AZ, during the 1962 elections, and the FBI made an investigation. The FBI investigative report dated November 1962 was made available to the Judiciary Committee in 1971, as well as 1986. Justice Rehnquist's name was not mentioned in the 1962 FBI investigative report as either a participant in or a witness to the incidents under investigation. Mr. Carl Muecke, U.S. attorney for the District of Arizona, and a Mr. Carl Sims, who had spent a great deal of time campaigning for the Democratic Party, both, when interviewed in 1962 by the FBI, specifically identified the individual involved in voter harassment as Mr. Wayne C. Bentson. Mr. Bentson, when interviewed by the FBI (in 1962, 1971, and 1986), admitted that he was the individual involved in an incident at the Bethune polling place in the 1962 general election.

During the course of the 1962 investigation, one of the individuals interviewed by the FBI was Mr. Robert Tate. Mr. Tate, when interviewed, described an incident involving voter harassment which occurred at the Bethune polling place in 1962. In 1971, Mr. Tate and another individual, Mr. Jordan Harris, who was never interviewed by the FBI in 1962, sent affidavits to the Judiciary Committee, alleging that Justice Rehnquist had taken part in voter harassment at the Bethune polling place on November 3, 1964 (as opposed to 1962). The incident described by Messrs. Tate and Harris in their 1971 affidavit is remarkably similar to Mr. Tate's own recollection when interviewed by the FBI in 1962 regarding the incident which took place at the Bethune polling place that same year, 1962; with the exception that Mr. Tate did not name Justice Rehnquist in his 1962 statement.

Judge Charles L. Hardy was the Democratic Party attorney in charge of the election advisory committee and arbitrator with respect to voter challenges and disputes during the 1960's. Judge Hardy in 1971, after being informed that testimony before the Committee that same year indicated that Justice Rehnquist was involved in voter harassment in 1964, wrote the Committee:

> I am informed . . . the events in question occurred during the general election of 1964. It is my recollection and the recollection of a number of others, both Democrats and Republicans, that actually 1962 was the correct year . . . I never observed Mr. Rehnquist attempting to chal-

lenge voters at any polling place. I understand that there was testimony that he had challenged voters at Bethune and Granada precincts. I can state unequivocally that Mr. Rehnquist did not act as a challenger at Bethune precinct.

In a November 19, 1971 letter (see appendix A) to Senators Bayh, Hart, and Kennedy, regarding his election activities during the 1960's, Justice Rehnquist wrote:

> I did speak at a school for challengers [1962], I believe, in much the same manner as in 1960. On election day, my recollection is that I spent most of the day in Republican county headquarters; however, I think that on several occasions in 1962, just as in 1960, I went to precincts where disputes had arisen in an effort to resolve them.
>
> With respect to 1964, I have seen an article in the Arizona Republic, dated October 1964, stating that I was chairman of the "Ballot Security Program.". . . My recollection is that on election day during this particular election I spent all of my time in county headquarters.
>
> I also think, though I am not certain, that I spoke at the school for challengers held just before the election; if I did not speak to the school, I believe I was present when someone else spoke on the law. Challengers were advised in this year, pursuant to an opinion issued by the State attorney general, that challenging at the polls on the basis of literacy or interpretation of the Constitution was unlawful by virtue of the Federal Civil Rights Act of 1964.

In response to his position as legal advisor to challengers Justice Rehnquist wrote:

> The recruitment of challengers in each of these years was under the direct supervision of someone other than me. However, in at least two of these elections—1960 and 1962—and perhaps in 1964, I spoke at a challengers' school conducted shortly before the election. The purpose of my talk was to advise the various persons who were to act as challengers as to what authorization was required in order to enable them to be present in a polling place during the time the election was being conducted, and also as to various legal grounds for challenging as provided by applicable Arizona law. My recollection is that I simply recited the grounds set forth in the Arizona Revised Statutes as to the manner in which the challenge was to be decided by the election board of the precinct in question.

Concerning challenges to determine literacy of potential voters, Justice Rehnquist stated:

> No such practice came to my attention until sometime on election day, 1962. The manner in which I saw this type of challenge being used, when I visited one precinct, struck me as amounting to harassment and intimidation, and I advised the Republican challenger to stop using these tactics. Since no question was raised at that time as to the propriety or lawfullness of the use of printed passages

> from the Constitution by challengers in conjunction with the election board in an otherwise courteous and lawful manner, I did not consider it. Shortly after the election, I discussed this type of challenge with Charles Hardy, now judge of the Superior Court of Maricopa County, and expressed my vigorous disapproval of any scattergun use of literacy challenges. By the time of the next biennial election, in 1964, such challenges were no longer permitted under Federal law.

Finally, Justice Rehnquist stated in his 1971 letter:

> I have read the affidavits of Jordan Harris and Robert Tate, both notarized in Maricopa County, AZ. Insofar as these affidavits pertain to me, they are false. I have not, either in the general election of 1964 or in any other election, at Bethune precinct or in any other precinct, either myself harassed or intimidated voters, or encouraged or approved the harassment or intimidation of voters by other persons.

The Committee received a letter with attachments on Augusts 7, 1986 (see appendix B), from Mr. Thorn Mayes, Jr., who was a resident of Phoenix AZ, and involved in election activities during the early 1960's. Mr. Mayes states:

DEAR SENATOR THURMOND: I am writing you this letter out of my concern that the true facts be known by your Committee concerning Judge Rehnquist's activities in Phoenix elections during the early 1960's. I was a resident of Phoenix during that interval and I was one of the poll watchers trained and organized by Mr. Rehnquist and his Republican Party Committee. I volunteered and served under Judge Rehnquist for the 1962 and 1964 elections.

In each election I had to go to a full evening training session conducted by Judge Rehnquist, several days before the election, in which he made us very familiar with the election laws of Arizona. He and his committee also made very clear exactly how an election challenge was to be made and on what basis it would be made.

Frankly, I was very impressed with the thorough training we got in the election laws in preparation for the election. Also, on the day of the election of the committee backed us up by giving us a special phone number to reach committee members that could be used if a real problem developed at the precinct. It was my understanding that Judge Rehnquist was one of those standing by at the special telephone that would come to a precinct immediately if one of us should call for help.

It's very difficult for me to accept the testimony of people like Senator Edward Kennedy who alleged that Judge Rehnquist harassed and intimidated black and Hispanic voters in Phoenix as part of a State Republican Party ballot security program when he was playing the role I described above, i.e., he was available on call if we needed legal help at the precinct.

In fact, I was very impressed by the legal preparation he gave us and the well planned security program by the Republican Party—even to the point of sending out huge numbers of first-class letters to Democrat polling lists to use the returned envelopes as chal-

lenges to those voters because their address was changed. No, Senator Thurmond, I do not agree that Judge Rehnquist should be criticized for his election security activities in Phoenix; rather, he should be given credit for organizing a very well informed organization that conducted a very fair poll watching activity during these elections. Never did I see anything in these activities that even suggested harassment or intimidation of any minority voters. I feel so strongly on this subject that I would be very willing to give any testimony or answer any questions to support this position.

In digging through my files I have found some of the papers that were used for our preparation of Vote Challenging. I am enclosing copies of these papers for your information. Hand written notes on these are my notes from the training sessions. It's interesting that I should save these papers for over 20 years. But the answer is simple; I was so impressed with what I learned from his training sessions that I saved these papers for future reference. And I have used them a few times in these years.

I hope these views "from the trenches" of what really happened in Phoenix elections in the early 1960's, and Judge Rehnquist's involvement, will be helpful in giving you a more accurate picture of these events. If I can be of any further assistance please call on me Senator.

Respectfully yours,

THORN MAYES, Jr.,
Phone 303–259–0562.

The instruction papers and documents for challengers provided to the Committee by Mr. Mayes clearly indicate that all efforts were made to insure that challengers totally abided by the law and were to avoid acting in an officious and unduly technical manner.

Justice Rehnquist's responses in 1971 are totally consistent with the information available to the Committee then and now in 1986. The FBI's investigative report and eyewitness accounts are totally supportive of Justice Rehnquist's rendition of his election activities in the 1960's.

Now, in 1986, individuals have come forward with essentially the same allegations against Justice Rehnquist, that sometime in the 1960's, and at some polling place, that Justice Rehnquist challenged, harassed, or intimidated voters.

Individuals who claimed to have information concerning the allegation of voter harassment were invited to testify before the Committee. Each of these witnesses were interviewed by the FBI prior to testimony before the Committee. Thirteen individuals came before the Committee in 1986 and testified on the voter intimidation matter. Five of these individuals were called by those opposed to Justice Rehnquist. All five who testified that Justice Rehnquist had in some manner harassed or challenged voters failed to make any such allegations against him during his confirmation hearing in 1971 to be Associate Justice.

Some of those who testified that Justice Rehnquist had harassed voters, as well as others interviewed by the FBI, did not know Justice Rehnquist at the time of the alleged incident and identified

him based on photographs which they saw 7 to 9 years after the fact.

The following cases in point will support the conclusion that Justice Rehnquist at no time challenged or harassed voters at the polling place in the 1960's or at any other time.

James J. Brosnahan, former assistant U.S. attorney in 1962, testified before the Committee in 1986 that Justice Rhenquist had challenged voters in 1962. However, prior to his testimony Mr. Brosnahan stated publicly that he never saw Justice Rehnquist actually challenge any voters at a polling place. He also stated publicly that the precinct where he saw Justice Rehnquist, and where he made an appearance in his official capacity as assistant U.S. attorney to investigate complaints, was in 1962 at the Bethune polling place. However, when Mr. Brosnahan appeared before the Judiciary Committee in 1986, he was unable to recall the precinct in question. In fact, he informed Senator Hatch that the "name of the precinct is not that clear to me. The stories talk about Bethune." He now remembered investigating several disturbances at various precincts. Mr. Brosnahan also stated that he was accompanied by an FBI agent during his election day investigations in 1962. As previously mentioned, there was an incident at the Bethune polling place in 1962 and it involved an individual by the name of Wayne C. Bentson.

A search of FBI's files fail to reveal any report filed by Mr. Brosnahan, or the FBI agent that allegedly accompanied him on election day 1962, regarding voter harassment by Justice Rehnquist. Although the FBI files do reveal that the Bureau received phone calls concerning complaints at various precincts in 1962 and 1964, there is no mention of Justice Rehnquist's name in any FBI report or complaint concerning this matter at that time.

Justice Rehnquist's role in the elections during the 1960's was that of legal advisor to the Maricopa County Republican Party. In this position he was required, on occasion, to visit precincts where disturbances occurred in order to mediate disputes and advise challengers.

Mr. Brosnahan's testimony that Justice Rehnquist was present at some precinct, in 1962, is completely consistent with Justice Rehnquist's statement in 1971 and to this Committee in 1986.

Melvin Mirkin, an attorney in Phoenix and a poll watcher during the 1960's, testified before the Committee in 1986 regarding the voter intimidation allegation. Mr. Mirkin was one of the witnesses called by opponents of Justice Rehnquist. One of Mr. Mirkin's first assertions was that he could not recall whether the incident took place in 1960 or 1962. Mr. Mirkin also testified that he did not actually see Justice Rehnquist challenge or harass voters, but only that Justice Rehnquist was giving instructions to a couple of people, presumably challengers, "in an audible voice." Mirkin also told the committee:

> I have always considered Mr. Rehnquist an honorable man, and I still do. And I do not feature myself being here in opposition to his appointment, but just to answer any questions that may be asked about that or any other incident.

When asked by the chairman if he came forward with similar information during the 1971 confirmation hearings, Mr. Mirkin responded:

> Oh, no. No, I did not come forward this time either, sir. I was asked. I do not volunteer.

Senator DeConcini inquired of the witness, based on his involvement in this situation, what he would do if he were going to vote on the confirmation of Mr. Rehnquist. Mr. Mirkin responded: "I would vote to confirm him based upon what I know."

Confusion often exists in such matters, particularly when the alleged incident occurred approximately 25 years ago. Such was the case of Rev. George Brooks. In January of 1969, Reverend Brooks was interviewed concerning Justice Rehnquist's nomination to be Assistant Attorney General, Office of Legal Counsel. At that time. Reverend Brooks advised the FBI that Justice Rehnquist was unknown to him and, consequently, he could not comment on his character, reputation, loyalty, his associates, or whether or not he could recommend him for a position with the Federal Government.

In 1971, Reverend Brooks was again interviewed by the FBI in regard to the nomination of Justice Rehnquist to be Associate Justice of the U.S. Supreme Court. Reverend Brooks indicated to the FBI that he had been informed by an individual that during the 1964 or 1966 general election, Justice Rehnquist had participated in the unfair challenging of black voters.

In 1986, when interviewed regarding Justice Rehnquist's nomination to be Chief Justice, Reverend Brooks informed the FBI that he, himself, was familiar with William Rehnquist and did see Rehnquist at the Julian Precinct in 1958. Though often well meaning, these discrepancies do occur.

In addition to the five individuals who testified in opposition to Justice Rehnquist, eight individuals appeared before the Committee in 1986 to testify on behalf of Justice Rehnquist concerning his activities during the elections in the 1960's. Seven of these individuals testified that Justice Rehnquist, to their knowledge, did not challenge or harass any voters in either 1962 or 1964, and that such activity would have been totally outside his responsibilities as a Republican Party official. These witnesses confirmed the fact that Justice Rehnquist's role was that of legal advisor to the Republican challengers and in this capacity he had a responsibility to resolve disputes at polling places as they might arise.

One of the witnesses that testified before the Committee was Judge Vincent Maggiore, former Democratic Party chairman for Maricopa County. Judge Maggiore informed the Committee:

> As a precinct committeeman, in the latter part of 1960, I was elected by the committee as the county chairman, the Maricopa County chairman. As the county chairman from late 1960, I was reelected in 1962, and I was the county chairman that was in office at the time all of the problems that you are facing came into being.
>
> I stayed county chairman until 1963. I had resigned at the death of President Kennedy. Senator Hayden request-

ed that I be reelected for a period of time so that a Thomas Murphy could be elected as the county chairman.

At the time I was county chairman in 1962, I was the culprit that caused all of your problems today. I have been a lifetime Democrat, and at the time of the problems as to voting with minorities, and Bethune was caused by me, I thought, as a matter of fact at that time that there was a little too much activity in the precincts, and I was the one that called the U.S. Attorney's Office, or I had called the U.S. attorney. I had quite a few assistants at that time. And I am the one that caused the action that was taken by the U.S. Attorney's Office.

During this period of time, and I appreciate the seriousness of this today, at no time did anybody come to me and state that Justice Rehnquist had committed any of the acts that I have heard for 2 or 3 days. I feel that I was the party leader—we were not an affluent party, by the way, gentleman—but I was the party leader and, for sure, all of these things should have come to me.

After the incident in Bethune, I realized that I was not going to get anything done as far as action by the U.S. Attorney's Office or action by the sheriff and the police were called also. I felt that I was not going to get anything done . . . I hope you realize that after 25 years it is very difficult to recollect each and every thing that occurred at that time. Too many things have passed.

But what I do recollect was that after Bentson [Wayne C. Bentson] was taken care of—and there was a little battle, and I may be—I hope the statute of limitations is broadened, because I may be the one that caused that battle to take place. I told some of my assistants to go and help out, to clear up the situation in Bethune.

I was at Bethune two or three times that day, and I was at other precincts where I thought this activity was not in accordance with the law. During all of this time, I never saw Justice Rehnquist there. I never saw him at any of the other precincts, either . . . a couple of days after the election and the incident in Bethune, I stopped Justice Rehnquist in the street. I told Justice Rehnquist that I was little disturbed because I felt that there were some deprivation of certain peoples' rights.

Justice Rehnquist—and I'm paraphrasing it—stated at that time that he agreed with me, that there should be something done in regards to protecting people's voting rights, that they were very important.

Judge Thomas Murphy was another individual knowledgeable of election activities in the 1960's. Judge Murphy, presently a judge for American Samoa and the 1964 Democratic county chairman of Maricopa County, informed the FBI in 1986 that he personally, in 1964, investigated complaints which were made about activities at the polling places. He stated that the allegations being made about Justice Rehnquist were totally unfounded.

Finally, Mr. Ed Cassidy, former police officer with 29 years' service on the Phoenix Police Department testified in 1986 before the Committee. Mr. Cassidy's statement to the Committee, also corroborated by the FBI's 1962 investigation, utterly refutes the allegation that Justice Rehnquist was involved in voter challenging or harassment in Phoenix. Mr. Cassidy told the Committee:

> I don't know the Justice, but I did spend all of November 6, 1962, the election day, at Bethune school. I was called into the school twice over disturbances. Both times a Mr. Wayne Bentson, the Republican challenger, was less than tactful—I guess that would be the way to describe him. This resulted in arguments with the Democrats that were there. It was over the literacy test. They wanted them to read a portion of the Constitution.
>
> By about 1:30, 2 or 3 o'clock in the afternoon, following the last disturbances, where he alleged he had been assaulted, he [Wayne Bentson] asked me for protection to his car. I took him to his car and followed him out of the area, and with him went the problem.
>
> At no time did I ever hear the Justice's name mentioned. I heard no problems regarding anyone, no arguments down there with anyone, except Wayne Bentson and the two Democratic challengers.

A copy of the police report (see appendix C) of the incident described above, dated November 6, 1962, was included in the 1986 hearing record. This official police record goes into detail regarding what occurred at the Bethune precinct on November 6, 1962, and at no place in the report is Justice Rehnquist named as a witness, participant, or instigator of any voter harassment or challenging. Additional checks into the Phoenix Police Department records fail to show any reports of disturbances at polling places for the year 1964.

The contemporaneous FBI report, the Phoenix Police report, statements of Judge Charles L. Hardy, former U.S. Attorney Carl Muecke, Judge Vincent Maggiore, and former Police Officer Ed Cassidy, agree that Justice Rehnquist was not involved in the 1962 incident at the Bethune Precinct, or any other precinct.

It is clear that a Republican challenger was involved in an incident at the Bethune polling place in 1962, and that this "challenger" was consequently escorted out of the polling place by a police officer. This person, the only person involved in the improper challenging in 1962, was Mr. Wayne C. Bentson.

In 1986 the Committee expanded its investigative effort and also invited numerous witnesses to testify regarding the allegation. On completion of this investigation the Committee came to essentially the same conclusion as that reached in 1971, Justice Rehnquist, although a legal advisor at the time, did not participate in any voter challenging or harassment. In fact, when all the evidence was reviewed, it gave a more definitive and favorable impression of Justice Rehnquist's activities and duties as a legal advisor.

Laird v. *Tatum*

Opponents of Justice Rehnquist have raised two main issues with respect to *Laird* v. *Tatum*. This case involved surveillance activities by the Department of the Army in connection with attempts to control civil disorder in the late 1960's. This was a class action suit brought against the Government on the grounds that the Army's activities had a chilling effect on the first amendment rights of the individuals being observed by the Army. During the time the case was progressing through the lower courts Justice Rehnquist was the Assistant Attorney General, Office of Legal Counsel. In 1971 he testified before the Senate Judiciary Subcommittee on Constitutional Rights chaired by Senator Sam Ervin. He testified as an expert witness for the Department of Justice on the subject of statutory and constitutional law dealing with the authority of the executive branch to gather information on private citizens.

The first issue raised is the contention that by virtue of his testimony as Assistant Attorney General during the time the case was in the lower courts, Justice Rehnquist, after having been appointed to the Supreme Court, should have recused himself from considering *Laird* v. *Tatum* when it came before the Supreme Court, because of his knowledge of the disputed evidentiary facts. Second, his detractors suggest that Justice Rehnquist was not candid with the Committee in 1971, when he stated that he did not have personal knowledge of the disputed evidentiary facts in the case.

While the controversy arising out of Justice Rehnquist's participation in the case is couched in terms of whether he had personal knowledge of the disputed evidentiary facts, the real issue was what constituted disputed facts. Thus both accusations are really the same.

Justice Rehnquist issued a comprehensive memorandum on October 10, 1972, detailing his reasons for declining to recuse himself in the case of *Laird* v. *Tatum*. See 409 U.S. 824 (1972). Justice Rehnquist's memorandum, which remains the best reply to the questions raised on this issue, is as follows:

October 10, 1972

> Memorandum of Mr. Justice Rehnquist.
>
> Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.[1]

[1] In a motion of this kind, there is not apt to be anything akin to the "record" that supplies the factual basis for adjudication in most litigated matters. The judge will presumably know more about the factual background of his involvement in matters that form the basis of the motion than do the movants, but with the passage of any time at all his recollection will fade except to the extent it is refreshed by transcripts such as those available here. If the motion

Continued

Respondents contend that because of testimony that I gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United States Senate at its hearings during the 92d Cong., 1st Sess., on Federal Data Banks, Computers and the Bill of Rights (hereinafter Hearings), and because of other statements I made in speeches related to this general subject, I should have disqualified myself from participating in the Court's consideration or decision of this case. The governing statute is 28 U.S.C. § 455, which provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Respondents also cite various draft provisions of Standards of Judicial Conduct prepared by a distinguished committee of the American Bar Association, and adopted by that body at its recent annual meeting. Since I do not read these particular provisions as being materially different from the standards enuniciated in the statute, there is no occasion for me to give them separate consideration.[2]

Respondents in their motion summarize their factual contentions as follows:

> "Under the circumstances of the instant case, Mr. JUSTICE REHNQUIST's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims."

Respondents are substantially correct in characterizing my appearance before the Ervin Subcommittee as an "expert witness for the Justice Department" on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.

Respondents' reference, however, to my "intimate knowledge of the evidence underlying the respondents' allegations" seems to me to make a great deal of very little.

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before me turned only on disputed factual inferences, no purpose would be served by my detailing my own recollection of the relevant facts. Since, however, the main thrust of respondents' motion is based on what seems to me an incorrect interpretation of the applicable statute, I believe that this is the exceptional case where an opinion is warranted.

[2] See S. Exec. Rep. No. 91-12, Nomination of Clement F. Haynsworth, Jr., 10-11.

When one of the Cabinet departments of the Executive Branch is requested to supply a witness for the congressional committee hearing devoted to a particular subject, it is generally confronted with a minor dilemma. If it is to send a witness with personal knowledge of every phase of the inquiry, there will be not one spokesman but a dozen. If it is to send one spokesman to testify as to the department's position with respect to the matter under inquiry, that spokesman will frequently be called upon to deal not only with matters within his own particular bailiwick in the department, but with those in other areas of the department with respect to which his familiarity may be slight. I commented on this fact in my testimony before Senator Ervin's Subcommittee:

> "As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding . . . ." Hearings 619.

There is one reference to the case of *Tatum* v. *Laird* in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin. The former appears as follows in the reported hearings:

> "However, in connection with the case of *Tatum* v. *Laird,* now pending in the U.S. Court of Appeals for the District of Columbia Circuit, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed." Hearings 601.

The second comment respecting the case was in a discussion of the applicable law with Senator Ervin, the chairman of the Subcommittee, during my second appearance.

My recollection is that the first time I learned of the existence of the case of *Laird* v. *Tatum,* other than having probably seen press accounts of it, was at the time I was preparing to testify as a witness before the Subcommittee in March 1971. I believe the case was then being appealed to the Court of Appeals by respondents. The Office of the Deputy Attorney General, which is customarily responsible for collecting material from the various divisions to be used in preparing the Department's statement, advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army Data Bank, and it was incorporated into the prepared statement that I read to the Subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out. Since the print-out had been lodged with the Justice Department by the Department of the Army, I later authorized its transmittal to the staff of the Subcommittee at the request of the latter.

At the request of Senator Hruska, one of the members of the Subcommittee, I supervised the preparation of a memorandum of law, which the record of the hearings indicates was filed on September 20, 1971. Respondents refer to it in their petition, but no copy is attached, and the hearing records do not contain a copy. I would expect such a memorandum to have commented on the decision of the Court of Appeals in *Laird* v. *Tatum*, treating it along with other applicable precedents in attempting to state what the Department thought the law to be in this general area.

Finally, I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court, in the Government's conduct of the case of *Laird* v. *Tatum*.

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U.S.C. § 455. The so-called "mandatory" provisions of that section require disqualification of a Justice or judge "in any case in which he has a substantial interest, has been of counsel, is or has been a material witness . . . ."

Since I have neither been of counsel nor have I been a material witness in *Laird* v. *Tatum*, these provisions are not applicable. Respondents refer to a memorandum prepared in the Office of Legal Counsel for the benefit of MR. JUSTICE WHITE shortly before he came on the Court, relating to disqualification. I reviewed it at the time of my confirmation hearings and found myself in substantial agreement with it. Its principal thrust is that a Justice Department official is disqualified if he either signs a pleading or brief or "if he actively participated in any case even though he did not sign a pleading or brief." I agree. In both *United States* v. *United States District Court*, 407 U.S. 297 (1972), for which I was not officially responsible in the Department but with respect to which I assisted in drafting the brief, and in *S&E Contractors* v. *United States*, 406 U.S. 1 (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation, I disqualified myself. Since I did not have even an advisory role in the conduct of the case of *Laird* v. *Tatum*, the application of such a rule would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." The interpretation and application of this section by the various Justices who have sat on this Court seem to have varied widely. The leading commentator on the subject is John P. Frank, whose two articles, Disqualification of Judges, 56 Yale L.J. 605 (1947), and Disqualification of Judges: In Support of the Bayh Bill, 35 Law & Contemp. Prob. 43 (1970), contain the principal commentary on the subject. For a Justice of this Court who has come from the Justice

Department, Mr. Frank explains disqualification practices as follows:

> "Other relationships between the Court and the Department of Justice, however, might well be different. The Department's problem is special because it is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal. As between the Assistant Attorneys General for the various Departmental divisions, there is almost no connection." *Supra,* 35 Law & Contemp. Prob., at 47.

Indeed, different Justices who have come from the Department of Justice have treated the same or very similar situations differently. In *Schneiderman* v. *United States,* 320 U.S. 118 (1943), a case brought and tried during the time Mr. Justice Murphy was Attorney General, but defended on appeal during the time that Mr. Justice Jackson was Attorney General, the latter disqualified himself but the former did not. 320 U.S., at 207.

I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the defense of the case of *Laird* v. *Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be, should later sit as a judge in a case raising that particular question. The present disqualification statue applying to Justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911. Mr. Chief Justice Stone, testifying before the Judiciary Committee in 1943, stated:

> "And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court of appeals judge, is was our manifest duty to take the same position." Hearings Before Committee on the Judiciary on H.R. 2808, 78th Cong., 1st Sess., 24 (1943), quoted in Frank, *supra,* 56 Yale L.J., at 612 n. 26.

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to

which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the popular-name index of the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S. Rep. No. 884, 75th Cong., 1st Sess. (1937). Nonetheless, he sat in the case that upheld the constitutionality of that Act, *United States* v. *Darby*, 312 U.S. 100 (1941), and in later cases construing it, including *Jewell Ridge Coal Corp.* v. *Local 6167, UMW*, 325 U.S. 161 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly criticized him for failing to do so.[3] But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Mr. Justice Frankfurter had, prior to coming to this Court, written extensively in the field of labor law. The Labor Injunction which he and Nathan Green wrote was considered a classic critique of the abuses by the federal courts of their equitable jurisdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

> "The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it." Labor and the Law, in Felix Frankfurter The Judge 153, 165 (W. Mendelson ed. 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101–115. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet, in addition to sitting in one of the leading cases interpreting the scope of the Act, *United States* v. *Hutcheson*, 312 U.S. 219 (1941), Justice Frankfurter wrote the Court's opinion.

Mr. Justice Jackson in *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), participated in a case raising exactly the same issue that he had decided as Attorney General (in a way opposite to that in which the Court decided it). 340 U.S. at

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[3] See denial of petition for rehearing in *Jewell Ridge Coal Corp.* v. *Local 6167, UMW*, 325 U.S. 897 (1945) (Jackson, J., concurring).

176. Mr. Frank notes that Mr. Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled Liberty, Property, and Social Justice he discussed at some length the doctrine expounded in the case of *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923). I think that one would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209–211. Nine years later, Mr. Chief Justice Hughes wrote the Court's opinion in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), in which a closely divided Court overruled *Adkins*. I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

> "In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and, more recently, when they are related to counsel; and when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no." *Supra*, 35 Law & Contemp. Prob., at 50.

Not only is the sort of public-statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public-statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Kristensen would have preferred not to argue before Mr. Justice Jack-

son;[4] that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Mr. Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

MR. JUSTICE DOUGLAS' statement about federal district judges in his dissenting opinion in *Chandler* v. *Judicial Council*, 398 U.S. 74, 137 (1970), strikes me as being equally true of the Justices of this Court:

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; layment recognize this when they appraise the quality and image of the judiciary in their own community."

Since most Justices comes to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policymaking divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had

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[4] The fact that Mr. Justice Jackson reversed his earlier opinion after sitting in *Kristensen* does not seem to me to bear on the disqualification issue. A judge will usually be required to make any decision as to disqualification before reaching any determination as to how he will vote if he does sit.

occasion to pass on an issue that later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, *e.g.*, the statement of Mr. Justice Harlan, joining in *Lewis* v. *Manufacturers National Bank*, 364 U.S. 603, 610 (1961). Indeed, there is weighty authority for this proposition even when the cases are the same. Mr. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of the court. See *Worcester* v. *Street R. Co.*, 196 U.S. 539 (1905), reviewing 182 Mass. 49 (1902); *Dunbar* v. *Dunbar*, 190 U.S. 340 (1903), reviewing 180 Mass. 170 (1901); *Glidden* v. *Harrington*, 189 U.S. 255 (1903), reviewing 179 Mass. 486 (1901); and *Williams* v. *Parker*, 188 U.S. 491 (1903), reviewing 174 Mass. 476 (1899).

Mr. Frank sums the matter up this way:

> "Supreme Court Justices are strong-minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way." *Supra*, 35 Law & Contemp. Prob., at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance that should not by itself form a basis for disqualification.[5]

Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair-minded judges might disagree about the matter. If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself simply because I do regard the question as a fairly debatable one, even though upon analysis I would resolve it in favor of sitting.

Here again, one's course of action may well depend upon the view he takes of the process of disqualification. Those federal courts of appeals that have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*. *Edwards* v. *United States*, 334 F. 2d 360, 362 n. 2 (CA5 1964); *Tynan* v. *United States*, 126 U.S. App. D.C. 206, 376 F. 2d 761 (1967); *In re Union Leader Corp.*, 292 F. 2d 381 (CA1 1961);

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[5] In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

Wolfson v. *Palmieri*, 396 F. 2d 121 (CA2 1968); *Simmons* v. *United States*, 302 F. 2d 71 (CA3 1962); *United States* v. *Hoffa*, 382 F. 2d 856 (CA6 1967); *Tucker* v. *Kerner*, 186 F. 2d 79 (CA7 1950); *Walker* v. *Bishop*, 408 F. 2d 1378 (CA8 1969). These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the "equal duty" concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal that may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. See, *e.g.*, *Tinker* v. *Des Moines School District*, 258 F. Supp. 971 (SD Iowa 1966), affirmed by an equally divided court, 383 F. 2d 988 (CA8 1967), certiorari granted and judgment reversed, 393 U.S. 503 (1969). While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not "bending over backwards" in order to deem oneself disqualified.

The prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard together here. During the six months in which I have sat as a Justice of this Court, there were at least three such instances.[6] Since one of the stated reasons for granting certiorari is to resolve a conflict between federal courts of appeals, the frequency of such instances is not surprising. Yet affirmance of each of such conflicting results by an equally divided Court would lay down "one rule in Athens, and another rule in Rome" with a vengeance. And since the notion of "public statement" disqualification that I understand respondents to advance appears to have no ascertainable time limit, it is questionable when or if such an unsettled state of the law could be resolved.

The oath prescribed by 28 U.S.C. § 453 that is taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . agreeably to the

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[6] *Branzburg* v. *Hayes*, U.S. 665 (1972); *Gelbard* v. *United States*, 408 U.S. 41, (1972); *Evansvi. Airport* v. *Delta Airlines Inc.*, 405 U. S. 707 (1972).

> Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantees a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.
>
> Based on the foregoing considerations, I conclude that respondents' motion that I disqualify myself in this case should be, and it hereby is, denied.[7]

Some opposed to the nomination have attached great significance to a memorandum dated March 25, 1969, from the Office of Legal Counsel, Department of Justice, dealing with intellegence gathering assignments within the Department of Justice and Department of the Army. This memorandum has been cited as showing personal knowledge on the part of Justice Rehnquist of the facts in *Laird* v. *Tatum*. Also, cited as supporting this view is testimony given by Justice Rehnquist to Senator Ervin's Subcommittee on Constitutional Rights in 1971. In his testimony before Senator Ervin, Justice Rehnquist referred to a computer printout of intelligence material. He stated that the information pertaining to the computer printout was provided to him or his staff by the Office of the Deputy Attorney General for use in preparing his testimony before Senator Ervin.

Neither the memorandum nor the reference to the printout provides any objective basis for concluding that Justice Rehnquist had any particular knowledge of the facts in *Laird* v. *Tatum*.

Both Justice Rehnquist and his opponents agree to the facts of his testimony. What they disagree on is its legal significance—whether it constitutes having "personal knowledge of disputed evidentiary facts." What is apparent here, is that his critics disagree with his legal analysis. At the time Justice Rehnquist was Assistant Attorney General he repeatedly made it clear in testimony before Senator Ervin's Subcommittee on the Constitution that his prepared testimony did not rest on personal knowledge of any ongoing case. The following excerpts from Mr. Rehnquist's testimony before Senator Ervin's subcommittee provide examples of this fact in referring to Army intelligence gathering activities which as stated was the issue in the *Laird* case.

Mr. Rehnquist stated:

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[7] Petitioners in *Gravel* v. *United States*, 408 U.S. 606 (1972), have filed a petition for rehearing which asserts as one of the grounds that I should have disqualified myself in that case. Because respondents' motion in *Laird* was addressed to me, and because it seemed to me to be seriously and responsibly urged, I have dealt with my reasons for denying it at some length. Because I believe that the petition for rehearing in *Gravel*, insofar as it deals with disqualification, possesses none of these characteristics, there is no occasion for me to treat it in a similar manner. Since such motions have in the past been treated by the Court as being addressed to the individual Justice involved, however, I do venture the observation that in my opinion the petition insofar as it refers to disqualification verges on the frivolous. While my peripheral advisory role in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), would have warranted disqualification had I been on the Court when that case was heard, it could not conceivably warrant disqualification in *Gravel*, a different case raising entirely different constitutional issues.

> As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick *someone who did not have personal knowledge* in every field. So I can simply give you my understanding . . .

Next:

> The Office of the Deputy Attorney General . . . advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army data bank, and it was incorporated into the prepared statement that I read to the subcommittee. I had then and have now *no personal knowledge* of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out. (409 U.S. at 827.)

Next:

> While it is not altogether clear to me, *certainly not from personal knowledge* . . . the extent the Army guidelines were actually carried out and practiced, it should be apparent that the data base used by internal security is much more restricted . . . than were the guidelines printed in the Congressional Record.

Next:

> Senator ERVIN. We have evidence here that the Army has developed . . . a two-volume compendium which . . . listed organizations and individuals who are under surveillance by the military. And our information from the military is to the effect . . . that the only copy of that today which is known to be still in existence is in the custody of the Department of Justice?
>
> Mr. REHNQUIST. I think that is correct, Mr. Chairman.

And lastly:

> I am not certain what use was made by the information gathered by the Army . . . so far as I know, the information gathered by the Army was not used by the [Justice] Department [in employment decisions].

Accordingly, it seems clear that Justice Rehnquist did not have any personal knowledge of the disputed facts in the *Laird* v. *Tatum* case.

Justice Rehnquist, in responding to questions from Senator Leahy on the subject of his analysis of the pertinent statute affecting a judge's disqualification from a case and any second thoughts he might have today on that position, stated:

> I realize people might disagree with me but that was the position I took in that case . . . I never thought of it again until these hearings, to tell the truth. I have gone back and read the opinion, and I think under the statute as it was changed after *Laird* v. *Tatum*; I think there would be probably a very strong ground for disqualification. But I didn't feel dissatisfied with the way I had behaved under the statute as it then stood.

This was a forthright statement by Justice Rehnquist concerning his views on the controlling statute in effect at the time as applied to the facts of the case. Additionally, Justice Rehnquist acknowledges that subsequent amendments to the law could possibly require a different conclusion.

In summary, the issue raised was one of legal analysis, upon which reasonable jurists could differ; however, in no way should Justice Rehnquist's actions be construed as being improper. His 1972 memorandum on the subject clearly explains his views on the disqualification statute at that time.

JUSTICE JACKSON'S MEMORANDUM

There has also been an allegation that Justice Rehnquist was not candid with the Committee in 1971 concerning a memorandum he wrote as a law clerk for Justice Robert H. Jackson in 1952. The memorandum was entitled: "A Random Thought on the Segregation Cases," and was written at the time the Supreme Court was considering *Brown* v. *Board of Education.* His critics contend that the memorandum was actually a statement of his views and not that of Justice Jackson's. In a December 8, 1971, letter to Senator Eastland, Justice Rehnquist stated:

DEAR MR. CHAIRMAN: A memorandum in the files of Justice Robert H. Jackson bearing my initials has become the subject of discussion in the Senate debate on my confirmation, and I therefore take the liberty of sending you my recollection of the facts in connection with it. As best I can reconstruct the circumstances after some nineteen years, the memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of *his* views at the conference of the Justices, rather than as a statement of my views.

At some time during the October Term, 1952, when the School Desegregation Cases were pending before the Supreme Court, I recall Justice Jackson asking me to assist him in developing arguments which he might use in conference when cases were discussed. He expressed concern that the conference should have the benefit of all of the arguments in support of the constitutionality of the "separate but equal" doctrine, as well as those against its constitutionality. In carrying out this assignment, I recall assembling historical material and submitting it to the Justice, and I recall considerable oral discussion with him as to what type of presentation he would make when the cases came before the Court conference.

The particular memoradum in question differs sharply from the normal sort of clerk's memorandum that was submitted to Justice Jackson during my tenure as a clerk. Justice Jackson expected case submissions from his clerks to analyze with some precision the issues presented by a case, the applicable authorities, and the conflicting arguments in favor either of granting or denying *certiorari*, or of affirming or reversing the judgments below. While he did expect his clerks to make recommendations based on their memoranda as to whether *certiorari* should be granted or denied, he very definitely did not either expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided.

The memorandum entitled "Random Thoughts on the Segregation Cases" is consistent with virtually none of these criteria. It is extremely informal in style, loosely organized, largely philosophical in nature, and virtually devoid of any careful analysis of the legal issues raised in these cases. The type of argument made is historical, rather than legal. Most important, the tone of the memorandum is not that of a subordinate submitting his own recommendations to his superior (which was the tone used by me, and I believe by the Justice's other clerks, in their submissions), but is instead quite imperious—the tone of one equal exhorting other equals.

Because of these facts, I am satisifed that the memorandum was not designed to be a statement of *my* views on these cases. Justice Jackson not only would not have welcomed such a submission in this form, but he would have quite emphatically rejected it and, I believe, admonished the clerk who had submitted it. I am fortified in this conclusion because the bald, simplistic conclusion that "*Plessy* v. *Ferguson* was right and should be re-affirmed" is not an accurate statement of my own views at the time.

I believe that the memorandum was prepared by me as a statement of Justice Jackson's tentative views for his own use at conference. The informal nature of the memorandum and its lack of any introductory language make me think that it was prepared very shortly after one of our oral discussions of the subject. It is absolutely inconceivable to me that I would have prepared such a document without previous oral discussion with him and specific instructions to do so.

In closing, I would like to point out that during the hearings on my confirmation, I mentioned the Supreme Court's decision in *Brown* v. *Board of Education* in the context of an answer to a question concerning the binding effect of precedent. I was not asked my views on the substantive issues in the *Brown* case. In view of some of the recent Senate floor debate, I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision.

Yours very truly,

WILLIAM H. REHNQUIST,
Assistant Attorney General,
Office of Legal Counsel.

Justice Rehnquist was stating without reservation that he was writing Jackson's views, not his own.

During the recent hearings Justice Rehnquist again made the statement that he was only writing views for Justice Jackson. That is consistent with his letter to the Committee in 1971 and his testimony before the Committee in 1986. What has apparently become the question to some members on the Committee was Justice Rehnquist's tone and manner of address in the 1952 memorandum. There is nothing to indicate that the views on this memorandum were his own. On the contrary, all available evidence, including the recollection of his co-clerk Donald Cronson, indicate that Justice Rehnquist was not writing his own views. On December 9, 1971, a telegram from Donald Cronson was put into the Congressional Record during Senate debate on the nomination of William Rehnquist to be an Associate Justice. The telegram reads as follows:

Please relay following memorandum to William Rehnquist.

A reporter telephoned me from the States last night and asked if I had any recollection concerning the memorandum on the segregation cases attributed to you in Newsweek. As a result of his request I have examined my files and reflected on the matter. It is my recollection that the memorandum in question is my work at least as much as it is yours and that it was prepared in response to a request from Justice Jackson to prepare such a memorandum. My recollection of the events leading to it is as follows.

Prior to the preparation of the memorandum referred to in Newsweek another memorandum was prepared of which I still have a copy. It is my recollection that I actually typed the first memorandum, although it is possible that you did. It was in any case the result of collaboration between us. That first memorandum supported the position that Plessy was wrongly decided, and that the Court should announce that it was wrongly decided, but that the Court should leave to the Congress the responsibility for taking action to change the system of segregated education that had grown up on the basis of the wrong decision in Plessy. After examining that memorandum—

Justice Jackson requested that a memorandum be prepared supporting the proposition that Plessy was correctly decided. The memorandum supporting Plessy was typed by you, but a great deal of its content was the result of my suggestions. A number of phrases quoted in Newsweek I can recognize as having been composed by me, and it is probable that the memorandum is more mine than yours.

I leave to your good judgment whether my recollection as set forth above should be publicized.

If you think I can provide any further information that will be helpful please telephone me. My office number in London is 839 1262. My home number is London 493 8181 or Gstaad, Switzerland, 43674.

DONALD CRONSON.

Although there appears to be some difference on the genesis of the 1952 memorandum, and his detractors try to make much of this matter, both Justice Rehnquist and Mr. Cronson agree that they were assigned to write different sides of the issue. Mr. Cronson has even stated that the memorandum is probably more his than Justice Rehnquist's. Memories of events that were 19 years old in 1971, and are now 34 years old today, cannot be held to be without some divergence. However, two substantive issues concerning the memorandum are acknowledged. First, that Justice Rehnquist thought that *Plessy* v. *Ferguson* was wrong in 1952, and still does, and second, that Cronson's explanation that Justice Rehnquist was assigned to write one side of the issue makes it convincingly clear that he was not expressing his own views in this 34-year-old memorandum.

At this time the matter appears to be totally irrelevant and without merit. Justice Rehnquist has served on the Supreme Court for 15 years. He has reviewed countless segregation and civil rights cases. In none of those cases has he questioned *Brown* v. *Board of Education* or suggested a return to *Plessy* v. *Ferguson*. In light of his performance as a Justice, it is hard to ascribe the significance of a 34-year-old memorandum written at the request of his superior.

This memorandum indicates little more than that Justice Jackson struggled greatly with this case before voting with the rest of the Court. *Plessy* v. *Ferguson* had been on the books for almost 60 years in 1952. *Brown* v. *Board of Education* was a landmark case with which Jackson, as well as the other Justices at the time, gave great thought and consideration. Justice Jackson asked for a memorandum from each of his clerks and received what he requested. There was no attempt to deceive in 1971 and there is certainly no reason to believe that there was any attempt to mislead the Committee in 1986.

Cornell Family Trust

It has been said that Justice Rehnquist acted unethically in setting up a trust account in 1961 for his brother-in-law Harold Dickerson Cornell, who had been diagnosed as having multiple sclerosis. The trust account was established by Harold Cornell's father, Dr. Harold Davis Cornell, for the express purpose of providing for Harold Cornell, when his disease made it impossible for him to provide for himself. A trust fund in the amount of $25,000 was established for Harold Cornell and was to be administered by his brother George Cornell.

Toward the end of the hearings on Justice Rehnquist's nomination to be Chief Justice the allegation, by Harold Cornell, that Justice Rehnquist acted unethically in not disclosing the existence of the trust, was brought to the attention of the Judiciary Committee. It should be noted that at no time does Harold Cornell assert that Justice Rehnquist or anyone else took any money from the trust fund. Although George Cornell never disclosed the existence of the trust to Harold Cornell, he did provide money from his own personal funds for Harold's use. The trust fund was never utilized for this purpose and remained totally intact.

The FBI was requested to thoroughly investigate this matter and submit a report to the Committee. This report was available to all members of the Committee for review prior to the Committee vote on the nomination. The claim by Mr. Harold Cornell of unethical behavior on the part of Justice Rehnquist apparently involves nothing more than a longstanding family dispute by an alienated family member.

The purpose of the trust, as mentioned previously, was to provide for the care of Mr. Harold Cornell upon his inability to provide for himself. While there is some disagreement within the family as to whether it was Justice Rehnquist or a "law partner" who assisted in preparing the trust, the weight of their belief is that Dr. Cornell insisted that Justice Rehnquist prepare the trust in order to save money and maintain confidentiality by keeping the matter in the

family. Justice Rehnquist finally acquiesced only as a favor to Dr. Cornell. It is important to note here that it was the express wish of Dr. Cornell that the trust be kept secret from his son Harold Cornell in an effort to keep him from invading the trust and spending all the funds therein.

The code of professional responsibility makes clear that, where the testator or settlor initiates the request and is aware of a potential interest by an attorney, there is no ethical problem with the attorney assisting in preparation of the trust or will. Indeed, Justice Rehnquist's conduct was consistent even with the nonbinding ethical considerations in the code. Harold Cornell complains that Justice Rehnquist did not tell him of the trust. But his siblings unanimously make it clear that this is exactly the way Dr. Cornell wanted it in order to protect his son, Harold Cornell. It was Dr. Cornell's well-founded fear that if Harold Cornell knew of the trust he would spend the money before it was needed for his final medical care. Finally, it was not the responsibility of Justice Rehnquist to administer the trust and provide for its beneficiaries. In this case, Dr. Cornell's son, George, was the trustee and therefore responsible. Justice Rehnquist had nothing to do with its administration.

In summary, the creation of the trust was necessary in Dr. Cornell's view because Harold Cornell, due to his illness, may at some time have been unable to provide for himself. Dr. Cornell instructed his children not to divulge the existence of the trust to Harold Cornell because he believed that, prior to Harold Cornell's final battle with the disease, he would invade the trust and dispose of it if he knew of its existence. Justice Rehnquist has been unfairly criticized merely for respecting the wishes of the settlor and refusing to disclose client confidences, under circumstances when he had neither the responsibility nor the authority to do so. The proceeds of the trust were for the benefit of Harold Cornell and on his death would pass to his issue. To suggest that Justice Rehnquist failed to disclose the existence of the trust because of the remote possibility of benefit to his wife and her siblings totally lacks merit.

Lone Dissenter—Out of the Mainstream

There has been a generalized allegation that Justice Rehnquist is out of the mainstream of constitutional thought. A qualitative and analytical review of his record on the Court will demonstrate that this indeed is not the case.

Ever since Justice Rehnquist's elevation to the U.S. Supreme Court, he has achieved an undeserved reputation as an ideological extremist whose conservative views place him on the fringe of the Court. As evidence of his alleged extremism, critics point to Justice Rehnquist's reputation as a lone dissenter, whose views on issues stand in direct contrast to those of the other eight Justices. A recent Law Journal article claimed that "in the 14 years in which he has served, no other Justice has so often filed lone dissents." Besides the statistical fallibility of such claims, it is interesting to note that the principles of many of the Justice's earlier lone dissents are gaining acceptance with the other Justices in recent

terms. In fact, these same arguments have formed the basis for several recent majority opinions of the Court.

In contrast to his popular image as an extremist, Justice Rehnquist is very much in the mainstream of the current Court. In fact, over the last four terms of the Court, no Justice has written more opinions of the Court than Justice Rehnquist. Of course there are some issues on which Justice Rehnquist remains a sole dissenter, but every Justice appears to have his or her particular idiosyncrasies about certain subjects. Despite the Court's holding to the contrary countless times, Justices Brennan and Marshall are well known for their belief that the eighth amendment prohibits capital punishment. Justice White is well known for his dissents in the cases dealing with State aid for parochial schools, despite the long-line of cases proscribing such aid. Justice Powell is adamant in his distaste for Court-created implied rights of action. Justice Stevens remains by far the greatest lone dissenter on the current Court with 27 solo dissents over the last four terms of the Court.

To claim that Justice Rehnquist is too far out of the mainstream, is a striking misperception of the thinking of the present Court. Justice Rehnquist has proven himself a leader of majorities, one who believes in equal justice for all, and there is no reason to think he will not continue to do so as Chief Justice.

Restrictive Covenants

Issue has been taken with the fact that properties, formerly and currently owned by Justice Rehnquist, had covenants which prohibited the sale or transfer of these properties to individuals of certain racial, ethnic or religious origin. The pertinence of raising this issue is negligible at best; however, Justice Rehnquist's opponents were attempting to demonstrate his lack of sensitivity to these individuals. This is not a valid issue, since such covenants in the early part of this century were a common occurrence. It is also important to note that under current law there is no requirement to have these covenants removed, since they are unenforceable and meaningless on their face. The covenants on Justice Rehnquist's former property in Arizona and his current summer residence in Vermont date back to the 1920's. The restrictive covenant which appeared on Justice Rehnquist's Arizona property deed was known by the Committee prior to the hearing in 1971 on his nomination to be Associate Justice. At that time it appropriately was not made an issue.

Now his opponents somehow wish to make a case that Justice Rehnquist is insensitive to certain individuals because a second property, located in Vermont, has a restrictive covenant. Again this is an issue that should not have been an area of such magnitude since it does not impinge on Justice Rehnquist's fitness to be Chief Justice. Although during his hearing he testified that he was unaware of the covenants on the Vermont property. Justice Rehnquist, after the conclusion of his hearing, searched his records concerning the Vermont property. In his search he discovered a copy of a letter, which was sent from his attorney to the seller's attorney. This letter described the condition of the title, including a reference to the restrictive covenant. Justice Rehnquist in an August

4, 1986, letter to the Committee, forwarded a copy of the July 2, 1974, attorney's letter. In his letter Justice Rehnquist stated:

DEAR MR. CHAIRMAN: After the conclusion of my testimony before the Senate Judiciary Committee last week, review of my file on the purchase of my Vermont property disclosed the attached letter of July 2, 1974. As you can see, the letter is from my attorney, Mr. David Willis, to the seller's attorney, Mr. John Downs, and describes the condition of title, including a reference to the restrictive covenant about which I was asked at the hearing. While I do not doubt that I read the letter when I received it, I did not recall the letter or its contents before I testified last week.

By letter of July 31, 1986, I requested Mr. Willis to undertake the legal measures necessary to remove the restrictive covenant from the title of my Vermont property.

I would appreciate your providing a copy of this letter, with the attached correspondence, to all members of the Committee.

Sincerely,

WILLIAM H. REHNQUIST.

Justice Rehnquist was open and forthcoming in making the attorney's letter available to the Committee. Justice Rehnquist also has asserted to the Committee that he would take the necessary steps to have the restrictive covenant removed from the deed; which, as previously stated, is not required due to the lack of enforcement.

HEALTH

There has been considerable interest regarding the health of Justice Rehnquist. By agreement of Committee members an independent physician was chosen to review the medical records of Justice Rehnquist. These records were to remain confidential, as was the reviewing physician's report. This independent review of his records was also agreed to by Justice Rehnquist.

At the end of his review the physician's report was made available to all members of the Committee. The reports conclusion was clear and unequivocal, that Justice Rehnquist had no unresolved health problems. That conclusion was based on the careful review of Justice Rehnquist's confidential medical records for the past 16 years. In short, after an exhaustive review of those documents and interviews with other physicians, the independent physician gave Justice Rehnquist a clean bill of health.

CONCLUSION

The Judiciary Committee has thoroughly reviewed all allegations, old and new, and has found nothing that would keep Justice Rehnquist from being elevated to the position of Chief Justice. The Committee also had the responsibility to determine if Justice Rehnquist possesses the qualities required of a Supreme Court Justice; namely, unquestioned integrity—honesty, incorruptibility, fairness; courage—the strength to render decisions in accordance with the Constitution and the will of the people as expressed in the laws of Congress; compassion—which recognizes both the rights of the individual and the rights of society in the quest for equal justice under

the law; proper judicial temperament—an understanding of, and appreciation for, the majesty of our system of government in its separation of powers between the Federal and State governments.

Based upon his responses to questions during the hearing, his outstanding qualifications and intellect, it was determined that Justice Rehnquist does possess these attributes and is overwhelmingly qualified to serve as Chief Justice of the United States.

The Committee on the Judiciary, therefore, in considering the nomination of Justice William H. Rehnquist to be Chief Justice of the United States, reports said nomination favorably and recommends the nominee's confirmation by the United States Senate.

APPENDIX A

ADDITIONAL QUESTIONS ADDRESSED TO WILLIAM H. REHNQUIST AND ANSWERS

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., November 19, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to the Committee's discussions yesterday, we are enclosing the questions we requested Mr. Rehnquist to answer.

We intend not to release these questions to the public until the answers are received, so that both the questions and the answers can be placed in the Record together. In the interest of time, we are transmitting a copy of these questions directly to the Department of Justice.

Thank you for your cooperation in this matter.

Very sincerely yours,

BIRCH BAYH.
PHILIP A. HART.
EDWARD M. KENNEDY.

QUESTIONS ADDRESSED TO WILLIAM REHNQUIST BY SENATOR BIRCH BAYH, SENATOR PHILIP HART, AND SENATOR EDWARD KENNEDY

In your testimony at the Judiciary Committee hearings you stated that you had advised the Justice Department to abandon the argument that the executive branch has the inherent power to wiretap without prior judicial authorization in cases involving the national security. You said (p. 321): "I felt it was a mistake for the Government to take the position there was inherent power, and that the case could best be put forward both from the point of view of the Government in its more limited interests as an adversary and in the interests of the Government in the larger point of view framed in terms of whether it was an unreasonable search and seizure under the Fourth Amendment, rather than some . . . overriding inherent power."

(*a*) Would you explain for the Committee what you meant by "the interests of the Government in the larger point of view?"

(*b*) What in theoretical and in practical terms is the significance of abandoning the inherent power theory in favor of an argument of reasonableness under the Fourth Amendment?

(*c*) You refused to answer certain questions during the course of the hearings because of a claim of attorney-client privilege (see, for example, pp. 100, 101, 102, 132, 133, 135, 136, 212, 247). Please explain how revealing that you advised the Justice Department to abandon a public position on wiretapping differs from other situations in which you invoked the attorney-client privilege. In light of the answer you have quoted above, are you now willing to answer the questions you declined to answer by invoking the attorney-client privilege? If so, please do so.

2. In 1964 you wrote a letter to the *Arizona Republic* opposing a city public accommodations ordinance. You stated at the hearings that your views on this matter had changed and you added (p. 145): "I think the ordinance really worked very well in Phoenix. It was readily accepted, and I think I have come to realize since it, more than I did at the time, the strong concern that minorities have for the recognition of these rights. I would not feel the same way today about it as I did then."

(*a*) Can you provide the Committee with any indication that your public views on this matter changed before your nomination to be a Supreme Court Justice?

(*b*) When and why did you come to realize "more than (you) did" in 1964 "the strong concern that minorities have for the recognition of these rights?"

(c) Would your present views be different as to the desirability of such legislation if the ordinance had not been as readily accepted as it was?

3. Four years ago in a letter to the *Arizona Republic* you stated your opposition to proposals to alter the "de facto segregation" of the Phoenix schools. Professor Gary Orfield of Princeton University has told this Committee that the "integration program" you found "distressing" "proposed no frontal attack on segregation, but called for freedom of choice desegregation with students paying their own bus fares to attend other high schools. The local superintendent also called for more exchanges between the various schools." (p. 13 of prepared testimony)

(a) Does your recollection of the program you opposed comport with that which Professor Orfield described? If not, how does your recollection differ?

(b) Would you explain for the Committee in more detail why you opposed the plan?

(c) Did you regard the scope of that effort in Phoenix in 1967 as an excessive commitment to an integrated society?

4. Mr. Clarence Mitchell has submitted to the Committee an affidavit from State Senator Cloves Campbell which alleges that following your testimony in opposition to the Phoenix public accommodations ordinance in 1964 you said to Mr. Campbell "I am opposed to all civil rights laws" (see p. 465). Did you make that or a similar statement to Mr. Campbell as alleged? If so, would you please elaborate on the circumstances and on what you meant by that statement.

5. In response to a question which asked for "a thumbnail sketch" of "what in your . . . background . . . demonstrates a commitment to equal rights for all . . ." you answered at the hearings (p. 127): "It is difficult to answer that question, Senator. I have participated in the political process in Arizona. I have represented indigent defendants in the Federal and State courts in Arizona. I have been a member of the County Legal Aid Society Board at a time when it was very difficult to get this sort of funding that they are getting today. I have represented indigents in civil rights actions. I realize that that is not, perhaps, a very impressive list. It is all that comes to mind now."

(a) Would you care to add anything to that list which has come to mind since the hearings?

(b) Please explain in more detail the nature of the civil rights actions in which you represented indigents, and please tell the Committee how many such actions there were.

(c) Was your membership in the Legal Aid Society Board *ex officio* by virtue of your position in the county bar association?

6. You testified before the Committee as follows in response to a question concerning your role in the government's efforts to prevent publication of the Pentagon Papers: "It does seem to me that because the government ultimately took a public legal position and argued the matter in the courts, that I would not be breaching the attorney-client relationship to answer your question.

"I am hesitant, but I believe that I am right in saying that I had a slipped disk operation in the latter part of May, and was either at home in bed or in the hospital until about the latter part of the second week in June. I am just trying to recall from memory. Then I started coming back into the office half days, and found that I was overdoing the first couple of days, so I stayed out again. And I think it was either on a Monday or Tuesday I was back in, perhaps for the third time, on a half-day basis, and the Attorney General advised me that the Internal Security Division was going to file papers that afternoon in New York to seek a preliminary restraining order and asked me if I saw any problem with it. And it was a short-time deadline, and I rather hurriedly called such of the members of my staff together as I was able to get.

"When we reviewed it we came across *Near* v. *Minnesota*, and advised him that basically it was a factual question so far as we could tell, if the type of documents that were about to be published came within the definition of the language used by Chief Justice Hughes in *Near* v. *Minnesota* there was a reasonable possibility that the Government would succeed in the action.

"I believe I had one other conference with the Attorney General, and I think that was as to who should appear for the United States in the proceedings in New York and in the second circuit. I then went to the beach for a week during which time the arguments took place in the Courts of Appeal, and I think the Supreme Court case was argued while I was at the beach, too, and I have no further involvement in it than that."

(a) Did you have any involvement in the government's action in this matter which is omitted from this statement? Did you for example place any phone calls to any newspapers asking them to refrain from publishing the Pentagon Papers?

7. Various Supreme Court nominees, including yourself, have properly refused to answer questions put to them by the Senate which would require the nominee prematurely to state his opinion on a specific case likely to come before him once on the bench. Some nominees have also properly declined to answer questions concerning cases they decided or opinions they wrote while sitting on the bench because answering them would have jeopardized the integrity and independence of the judiciary. You invoked yet a third doctrine to decline to answer certain questions at the hearings: the attorney-client privilege. Are you aware of any precedent in the Senate's consideration of a federal official nominated to the Supreme Court or any legal precedent in decided cases or the cannons of ethics or elsewhere, which supports a nominee's invoking the attorney-client privilege to refuse to give the Senate his personal views on matters of public importance on which he had advocated an Administration's position?

8. You and Senator Tunney had the following exchange during the hearings:

"Senator TUNNEY. Senator Ervin then went on to question you, 'don't you agree with me any surveillance which would have the effect of stifling such activities, namely, the first amendment, those activities which are privileged under the first amendment, would violate those constitutional rights?' Your answer was, 'No, I do not.'

"Mr. REHNQUIST. I am not sure I do agree with that now. I am inclined to think that it is a fact question and I was perhaps resolving the fact question in my own mind on the basis of the line of inquiry that Senator Hart made yesterday, where thousands of people came, knowing there was going to be such surveillance, on the basis of Judge Austin's decision in Chicago, where he found as a fact that there was no stifling effect.

"I do not think I would want to categorically say that such surveillance could not have a stifling effect. I think I would treat it as a question of fact.

"Senator TUNNEY. I appreciate your answer."

(*a*) When you said that you are not sure you would agree with your prior statement now, were you expressing a personal opinion or were you expressing a Justice Department position?

(*b*) If you were expressing a personal opinion, why in your view was this situation different from other situations in which you refused to state a personal view on positions you had taken as an advocate for the Administration?

9. At the time that you testified before Senator Ervin's Subcommittee on Constitutional Rights with regard to the government's intelligence-gathering activities, you said that it was "quite likely that self-discipline on the part of the executive branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering."

(*a*) Were you aware at that time as reported in the press, that Federal Bureau of Investigation agents in at least one part of the country had been instructed to conduct interviews for the purpose of making dissenters believe that "there is an agent behind every mailbox" (see, e.g., p. 425–26, 581)?

(*b*) Does this document give you any reason to alter your views that executive self-restraint will provide sufficient protection of first and fourth amendment freedoms?

10. Please describe in as much detail as possible your position (including title and the manner in which you were selected), responsibility, and activities in connection with Republican Party efforts to challenge Democratic voters in Arizona for each of the following elections, separately: 1958, 1960, 1962, 1964, 1966, 1968.

In addition, please answer the following questions concerning your position, responsibility or activities in each of the above-mentioned years:

(*a*) Did you personally engage in challenging the qualifications of any voters? If so, please describe the nature and extent of the challenging you did and the bases on which the challenges were made.

(*b*) Did you train or counsel persons selected to be pollwatchers or challengers about the procedures to be used in challenging? If so, please elaborate concerning how the persons were selected, and the training that you gave. Did you in any of the above-mentioned years train or counsel persons selected to be pollwatchers on the bases on which challenges could be made? If so, please elaborate concerning what you advised these persons were proper bases under law for challenges in each of the relevant years.

(*c*) Did you prepare, select or advise on the use of printed passages from the Constitution designed to be employed by challengers to determine the literacy of a potential voter? Did any such practice come to your attention? Did you think it proper and lawful? If not, did you take steps to curb such procedures?

11. To what extent are you able to confirm Mr. Richard G. Kleindienst's statement found in the *Arizona Republic* of November 7, 1962, that the Republican challengers who worked in 1962 "are the same persons, under the same instructions, who have been doing this in Maricopa and Pima counties since 1956?"

12. You testified that one of the roles you played in the Republican efforts to challenge Democratic voters was "to arbitrate disputes that arose" along with a Democratic counterpart (p. 149). Did any of the disputes as to the roles of the Republican challengers which you sought to mediate involve opposition to the type of challenging procedure being employed or the basis of the challenge, as distinct from the right of the Republican challenger to function at all in such a capacity in the precinct in question? If so, please explain the challenging procedures which came under attack.

13. Judge Charles L. Hardy in a letter to Senator Eastland describes the tactics of the Republican Party in Phoenix in 1962 as follows: "In 1962, for the first time, the Republicans had challengers in all of the precincts in this county which had overwhelming Democratic registrations. At that time among the statutory grounds for challenging a person offering to vote were that he had not resided within the precinct for thirty days next preceding the election and that he was unable to read the Constitution of the United States in the English language. In each precinct *every* black or Mexican person was being challenged on this latter ground and it was quite clear that this type of challenging was a deliberate effort to slow down the voting so as to cause people awaiting their turn to vote to grow tired of waiting and leave without voting. In addition, there was a well organized campaign of outright harassment and intimidation to discourage persons from attempting to vote. In the black and brown areas, handbills were distributed warning persons that if they were not properly qualified to vote they would be prosecuted. There were squads of people taking photographs of voters standing in line waiting to vote and asking for their names There is no doubt in my mind that these tactics of harassment, intimidation and indiscriminate challenging were highly improper and violative of the spirit of free elections."

(*a*) Please describe the relationship between your role in planning and implementing Republican election day challenging efforts that year and the tactics described by Judge Hardy.

(*b*) Did any of the practices described by Judge Hardy come to your attention before or during election day in 1962? If so, did you seek to curb such procedures or were they in your view proper?

14. Were you present at the Bethune precinct at any time on election day, November 3, 1964? If so, while you were there, did you speak to any persons waiting to vote regarding their qualifications to vote under the state literacy laws or other laws, or regarding their ability to read the Constitution? Did you ask anyone waiting to vote at the Bethune precinct in 1964 to read from any printed material which you or anyone else presented to the potential voter? Were you engaged in any dispute at the Bethune precinct in 1964 with Democratic workers regarding efforts by yourself or other Republican representatives to challenge voters? If so, please describe the incident in detail.

15. The *St. Louis Post-Dispatch* of November 18 carries a story which states that "documents have been discovered suggesting" that you were "once a member of a rightwing organization" called "Arizonans For America," or "For America." You have previously denied that you are or at any time in the past have been a member of the John Birch Society. Have you been a member of the "Arizonans For America" as is alleged by the *St. Louis Post-Dispatch?* Do you have any additional response to the article.

DEPARTMENT OF JUSTICE.
Washington, D.C., November 20, 1971.

Hon. JAMES O. EASTLAND.
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: Enclosed are my answers to the questions propounded to me by members of the Senate Judiciary Committee.

Yours very truly,

WILLIAM H. REHNQUIST.
Assistant Attorney General,
Office of Legal Counsel.

1. (*a*) When I used the phrase "the interests of the Government in the larger point of view," I meant that the Government is under a greater obligation than

the ordinary adversary in a lawsuit to make a reasoned, responsible presentation of its case.

(*b*) One implication of the "inherent power" position was that in this area the Executive was not subject to the requirements of the Fourth Amendment. The effect of the abandonment of the "inherent power" theory in favor of the argument of reasonableness under the Fourth Amendment was to recognize that the Executive is subject to the restraints of the Fourth Amendment in this area as elsewhere. The practical result was to recognize that the courts would decide whether or not this practice amounted to an unreasonable search which would violate the Fourth Amendment.

(*c*) During the course of the hearing I declined to answer the questions enumerated because I felt it inappropriate for one who has spoken as an advocate for the Attorney General or for the President to thereafter offer his personal opinion on the same subject. I see nothing inconsistent between that position and my willingness to explain my contribution to a Departmental position which was primarily developed by the Internal Security Division, and ultimately publicly expounded by the Solicitor General.

2. (*a*) In a speech delivered in Houston for Law Day, April 29, 1970, I referred to the fact that "dramatic progress has been made by minorities in all of the civil rights areas in the past generation." I would not have referred to a law of the type I had opposed in 1964 as representing "dramatic progress" if I still opposed that type of law.

(*b*) It is impossible for me to pick out any particular date on which I came to realize "more than I did" in 1964 "the strong concern that minorities have for the recognition of these rights." When I spoke in Phoenix in 1964 I placed a good deal of emphasis on the fact that very few restaurants in Phoenix actually did discriminate and therefore the denial of these rights in practice was infrequent. In the intervening years, at least in part as a result of having become acquainted with more members of minority groups, I have come to appreciate the importance of the legal recognition of rights such as this without regard to whether or not that recognition results in a substantial change in custom or practice.

(*c*) No. While the manner in which the ordinance was accepted was a factor in changing my opinion, my realization of the depth of feeling of the minorities about this sort of right would not be diminished, and would control, even though the ordinance had been less readily accepted.

3. (*a*), (*b*) This question refers to a letter to the Editor appearing in the *Arizona Republic* on Saturday, September 9, 1967, which is captioned "'De facto' Schools Seen Serving Well." The question characterizes the letter as stating my "opposition to proposals to alter the 'de facto segregation' of the Phoenix schools." The letter, of course, speaks for itself; the caption above the letter was not chosen by me. My position, as stated in the letter, was clearly not opposed to a number of the proposals advanced by Superintendent Seymour for reducing *de facto* segregation.

While I have not had an opportunity to review the series of articles by the newspaper reporter, Mr. Harold Cousland, to which my letter refers, I have reviewed a copy of an article in the *Arizona Republic* describing the Superintendent's "integration program" for Phoenix high schools. Referring to this letter, and to my own recollection of the situation in Phoenix at that time, I think that Professor Orfield's description of the Superintendent's proposal is materially inaccurate. Professor Orfield says that the "integration program" called for "freedom of choice desegregation with students paying their own bus fare to attend other high schools." This was not a part of the Superintendent's *proposal* at all; it was a program *already in effect* in Phoenix at that time. I was in full agreement with this program. Superintendent Seymour, according to the article, in fact commented that there was little evidence that minority groups had taken advantage of this existing "open enrollment" policy.

Thus, Professor Orfield confuses the program of open enrollment which was already in effect in Phoenix with a series of additional proposals made by Superintendent Seymour in September, 1967. Among these proposals was the appointment of a policy advisor who was skilled in interpersonal relations and problems, the organization of a city-wide citizens advisory committee representing minority groups, the formation of a human relations council at each high school, and the promotion of a voluntary exchange of students among racially imbalanced schools. He went on to suggest, in addition to this voluntary exchange of students, that he would not rule out busing of students as a partial solution.

As is clear from my letter, I was speaking out in favor of the neighborhood school system, which is entirely consistent with a number of Superintendent

Seymour's proposals. It was not, however, consistent with his statement that he would "not dismiss busing of students as a partial solution." In the context of a proposal which had already discussed voluntary exchange of students, and which was made in the context of an existing open enrollment program, the sort of busing envisioned by Superintendent Seymour was inconsistent with the neighborhood school concept. The reason for my opposition to this type of busing can best be expressed in the words which I used at that time: "The school's job is to educate children. They should not be saddled with the task of fostering social change which may well lessen their ability to perform their primary job."

3. (*c*) To the extent that the term "that effort" used in this question refers to the suggestion of busing outside of neighborhood schools solely for the purpose of establishing racial balance, I regarded it as undesirable for the reasons stated in my letter and therefore excessive. I certainly did not consider the open enrollment program already in effect in Phoenix in 1967, which is basically that described in the quoted language of Professor Orfield, as being in the least excessive.

4. I did not make the statement described in question 4, or any similar statement, to Senator Cloves Campbell.

5. (*a*) I have recalled since my testimony at the hearings that in 1963 I served as an Associate Member of the American Bar Association Special Committee on the Defense of Indigent Persons Accused of Crime. Since becoming Assistant Attorney General, I have publicly testified in support of the ratification of the Genocide Convention and in support of the Equal Rights Amendment. As Assistant Attorney General, I also supervised and personally participated in the preparation of the Attorney General's Opinion upholding the lawfulness of the so-called "Philadelphia Plan."

(*b*) (Note: With respect to this question, and subsequent questions which call for historical recollection of legal cases or political activities in which I participated, I have tried as best I can to recall the events requested. I have not had the benefit of my case files or of any other contemporaneous written material, which might have been of significant aid in sharpening my recollection.)

Throughout my practice in Phoenix, I took cases on a regular rotating basis from the Legal Aid Society, a practice followed by many but by no means all of the Bar. In addition, after the *Gault* decision was handed down, I responded to a request from the then Juvenile Court judge for lawyers with some experience to appear without compensation representing juvenile defendants. I would estimate that in addition to the three cases mentioned below, there would be several times that number of the same general description, the particulars of which I cannot now recall.

I recall the following fairly recent representation of indigents outside the criminal defendant area:

(*i*) I was requested by the Juvenile Court judge of Maricopa County to represent the interests of a woman who had been committed to the State mental hospital during a juvenile proceeding in which she had been deprived of custody of one of her children.

(*ii*) I represented an elderly woman who was threatened with the sale of her interest in a home as a result of a judgment taken against her by a collection agency in which, as I recall, she contended she had a defense which she had no opportunity to assert because of lack of proper notice of proceedings.

(*iii*) I spent a good number hours, partly on the Navajo Reservation and partly in my office in Phoenix, counselling with a group of Indians who constituted one faction in a tribal dispute revolving around whether certain actions taken by the tribal chairman could properly be taken by him, or whether instead they required the approval of the tribal council.

(*c*) My recollection is that either as Vice President of the Maricopa County Bar Association, or as its immediate past President, I was an *ex officio* member of the Legal Aid Society Board. It would be a mistake to assume from the word *ex officio* that the position was by any means a ceremonial one; it was the principal bar association duty of the officer filling that post. At the time I served, the County Bar Association contributed a substantial part of the total funds available to the Legal Aid Society Board for its operating budget, and I took an active part in the work of the Board.

6. I took one action in connection with proposed litigation by the Government against *The Washington Post* in connection with its publication of portions of the Pentagon Papers. At the request of the Attorney General on a date which I believe was Friday, June 18, I telephoned Mr. Ben Bradlee, Executive Editor

of *The Washington Post*, and requested on behalf of the Justice Department that the *Post* refrain from further publication of these papers. Mr. Bradlee told me that the *Post* would not accede to this request. I believe that my telephone conversation with Mr. Bradlee was described in a story in the *Post* on Saturday, June 19.

7. I know of no other Supreme Court nominee who, having acted as a representative or spokesman for the Executive Branch, was then asked by the Judiciary Committee to express his personal views on the matters with respect to which he had served as a spokesman or advocate. There is, therefore, so far as I know, precedent neither for the questions being asked, nor for the answers being declined.

8. (*a*) I was expressing the position that I felt any reasonable spokesman for the Department would have taken had he been aware of this aspect of the problem at the time of his original testimony.

(*b*) Not applicable.

9. (*a*) I was not.

(*b*) This question characterizes my views as being "that Executive self-restraint will provide sufficient protection of First and Fourth Amendment freedoms." I do not believe this is a fair characterization of the views which I expressed before the Ervin Subcommittee, and it is therefore all but impossible to answer the question as stated. I made quite plain in my testimony, I thought, that both the First Amendment and the Fourth Amendment imposed significant limitations on governmental information gathering. The context in which I made my statement about "Executive self-restraint" was one in which the protections of the First and Fourth Amendments to the Constitution, and such additional statutory limitations on the Executive as those pertaining to wiretapping in the Omnibus Crime Bill of 1968, were already in existence, and the question to which I was addressing myself was whether additional statutory restrictions were desirable.

To the extent that the actual activities of the FBI, as opposed to the characterizations of such activities by a particular agent or by the press, were in fact such as to have a chilling effect, there would be an added factor to be weighed in making a constitutional determination under the First Amendment. If such activities were at all prevalent, I indicated in my testimony before the Ervin Subcommittee that the Department would give careful consideration to remedial legislation.

Following is the text of my statement on these points:

"I think it quite likely that self-discipline on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering. No widespread system of investigative activity, maintained by diverse and numerous personnel, is apt to be perfect either in its conception or in its performance. The fact that isolated imperfections are brought to light, while always a reason for attempting to correct them, should not be permitted to obscure the fundamental necessity and importance of federal information gathering, or the generally high level of performance in this area by the organizations involved.

"In saying this, I do not mean to suggest that the Department of Justice would adamantly oppose any and all legislation on this subject. Legislation which is carefully drawn to meet demonstrated evils in a reasonable way, without impairing the efficiency of vital federal investigative agencies, will receive the Department's careful consideration. But it will come as no surprise, I am sure, for me to state that the Department will vigorously oppose any legislation which, whether by opening the door to unnecessary and unmanageable judicial supervision of such activities or otherwise, would effectively impair this extraordinarily important function of the federal government."

10. During the course of the Committee's deliberations, I submitted the following affidavit to the Chairman of the Committee:

"I have read the affidavits of Jordan Harris and Robert Tate, both notarized in Maricopa County, Arizona. Insofar as these affidavits pertain to me, they are false. I have not, either in the general election of 1964 or in any other election, at Bethune precinct or in any other precinct, either myself harassed or intimidated voters, or encouraged or approved the harassment or intimidation of voters by other persons."

In order to fully respond to question 10, an understanding of the background of Republican challenging procedures in Maricopa County is necessary. I have therefore tried as best I can to recall and set forth that background.

A combination of the peculiarities of Arizona election law, the customary practices of the Board of Supervisors in appointing precinct election officials, and the numerical weakness of registered Republicans in part of the Country resulted in the fact that the only method by which a Republican observer or poll watcher could be stationed inside a particular polling place in many precincts in order to watch for voting irregularities was to be there as a "challenger." While he was authorized by law to challenge voters, the prospects of his being successful were not great, since the challenges be made were ruled upon by a three-man election board (two judges and an inspector) and in the precincts with extraordinarily heavy Democratic registration at least two and often three members of this board would be Democrats. The challenger's real usefulness to the Party, therefore, was not that he was going to be able to prevail upon the election board to disqualify any large number of voters, but that his mere presence as a party representative would have a tendency to discourage any large-scale irregularities in voting procedures at that precinct. My recollection is that the most frequent cause of dispute which arose on Election Day during the late 50s and early 60s was the nature of the credentials required for a challenger to be allowed to enter and remain in a polling place, since in many of these precincts there had never been a Republican representation on the scene during Election Day.

With respect to the specific questions posed, I have attempted to refresh my recollection by speaking with several persons in Arizona who acted in Republican Party affairs during the years covered in this question and to Judge Hardy, who was active for the Democratic Party at the same time. I have also had occasion to see two local newspaper articles which appeared in the Fall of 1964, describing my position during the elections of 1960, 1962, and 1964. I recall that at the time there were written schedules, instructions, and the like prepared at least for the elections of 1960, 1962, and 1964, but I have not found anyone who was able to locate any of this written material, and it may no longer be in existence.

In 1958, I became involved in the Election Day program on quite short notice, and spent all the day at Republican County Headquarters in Phoenix answering questions as to the election laws on the telephone. So far as I remember, I was the only person having this responsibility at County Headquarters. I don't believe I had a title, and I cannot remember by whom I was selected. As I recall, Don Reese, then of Phoenix but presently of Houston, Texas, was County Chairman in 1958.

My attention has been called to a clipping from the *Arizona Republic* in October 1964, which states that in 1960 I was co-chairman of the "Ballot Security Program." I do not have any independent recollection of this fact, but I have no reason to dispute the account in the newspaper. As I recall, however, the program in 1960 was not called the "Ballot Security Program," since I don't remember hearing that term used before 1964.

In 1960, I supervised and assisted in the preparation of envelopes to be mailed out in advance of the election for the purpose of challenging voters on the basis of their having moved from the residence address shown on the poll list; I also recruited about a half a dozen lawyers to work on a "Lawyers Committee" on Election Day. I did not myself recruit challengers, but I did speak to a "school" held for challengers shortly before election, in order to advise them on the law. I believe I also supervised and assisted in the assembling of returns of our mailings which were returned "addressee unknown", so that they could be made available to the particular challenger who was stationed in the precinct in which the address was located. On Election Day, I believe that I spent most of the day in County Headquarters. In that year, however, we had enough other lawyers available in County Headquarters so that I probably spent some of the day going to precincts where a dispute had arisen, and attempting to resolve it.

I cannot remember whether Don Reese or Ralph Staggs was County Chairman in 1960; I believe I was designated by whoever was County Chairman that year.

With respect to 1962, I have been shown an article in the October 1964, *Arizona Republic* which states that I was Chairman of a Lawyers Committee which operated on Election Day. This is consistent with my own recollection. I do not believe that in this year I participated in the mailing out of envelopes prior to election, though I may have. I did speak at a school for challengers, I believe, in much the same manner as in 1960. On Election Day, my recollection is that I spent most of the day in Republican County Headquarters; however, I think that on several occasions in 1962, just as in 1960, I went to precincts where disputes had arisen in an effort to resolve them.

With respect to 1964, I have seen an article in the *Arizona Republic* dated October 1964, stating that I was Chairman of the "Ballot Security Program." This is consistent with my recollection. I presume that I had overall responsibility for the mailing out of envelopes, the recruiting of challengers, and the recruiting of members of the Lawyers Committee to work in County Headquarters; however, I believe that there were individuals other than me who were directly responsible for each of these aspects of the program. At this time, Wayne Legg was Chairman of the Republican County Committee, and I presume it was he who designated me as chairman. My recollection is that on Election Day during this particular election I spent all of my time in County Headquarters.

I also think, though I am not certain, that I spoke at the school for challengers held just before the election; if I did not speak to the school, I believe I was present when someone else spoke on the law. Challengers were advised in this year, pursuant to an opinion issued by the State Attorney General, that challenging at the polls on the basis of literacy or interpretation of the Constitution was unlawful by virtue of the Federal Civil Rights Act of 1964.

In 1966, my best recollection is that I played no part at all in the election activities, though I am not absolutely certain. If I played any part, it was simply to serve as a lawyer on duty at County Headquarters for a period of several hours in order to handle questions that might come in over the phone.

In 1968, I played no part at all in the election activities.

(*a*) In none of these years did I personally engage in challenging the qualifications of any voters.

(*b*) The recruitment of challengers in each of these years was under the direct supervision of someone other than me. However, in at least two of these elections—1960 and 1962—and perhaps in 1964, I spoke at a challengers' school conducted shortly before the election. The purpose of my talk was to advise the various persons who were to act as challengers as to what authorization was required in order to enable them to be present in a polling place during the time the election was being conducted, and also as to the various legal grounds for challenging as provided by applicable Arizona law. My recollection is that I simply recited the grounds set forth in the Arizona Revised Statutes as to the basis for challenge, the method of making the challenge, and the manner in which the challenge was to be decided by the Election Board of the precinct in question.

(*c*) I did not. No such practice came to my attention until sometime on Election Day, 1962. The manner in which I saw this type of challenge being used, when I visited one precinct, struck me as amounting to harassment and intimidation, and I advised the Republican challenger to stop using these tactics. Since no question was raised at that time as to the propriety or lawfulness of the use of printed passages from the Constitution by challengers in conjunction with the election board in an otherwise courteous and lawful manner, I did not consider it. Shortly after the election, I discussed this type of challenge with Charles Hardy, now Judge of the Superior Court of Maricopa County, and expressed my vigorous disapproval of any scattergun use of literacy challenges. By the time of the next biennial election, in 1964, such challenges were no longer permitted under federal law.

11. I cannot speak at all for Pima County, and I cannot speak at all for 1956. I did not myself directly supervise the recruiting of challengers in Maricopa County in any of these years. If challengers were instructed in any formal way in 1958, I do not remember it. Substantially the same legal advice as to challenging, more fully described in the answer to 10(b) above, was given by me in both 1960 and 1962. I do not presently remember whether the same challengers operated in 1958, 1960, and 1962, but I believe there was some turnover each time, and a rather substantial turnover between 1960 and 1962.

12. As described in my answer to 10(c), I recall one instance in which a Republican challenger was himself going down the line and requiring prospective voters to read some passage of the Constitution, rather than presenting his challenge to the Election Board in an orderly way. I advised him to stop this practice, and to make any challenges in the manner provided by the law.

13.(*a*) My role in 1962 was, to the best of my recollection, that described above. I neither advised nor suggested that scattergun challenges be made on the basis of literacy. I neither advised nor suggested the handing out of handbills, nor the photographing of voters at the election places. My talk to the challenging "school" in 1962 as to the law governing elections was, I believe, substantially the same as that which I gave in 1960. In 1958 and in 1960 virtually the entire

thrust of the Republican challenging effort was devoted to preventing unregistered persons, or persons who had moved from the address from which they were registered, from voting, and as I recall the main disputes which arose in those years with respect to the right of the Republican challengers to enter the polling place to which he was assigned. I did not realize the change in emphasis of some of the Republican challengers in 1962 until sometime during Election Day of that year. I therefore feel that there was no connection between my role and the circumstances related by Judge Hardy.

(b) The practices described by Judge Hardy, to the extent that they did in fact obtain, did not come to my attention until quite late in the day of the election in 1962. At that time I believe that the County Chairman decided to remove the Republican challenger from Bethune Precinct because of the serious trouble his actions were causing. The challenging procedures relating to residence described by Judge Hardy were, in my opinion, generally proper; those relating to indiscriminate use of literacy challenges were entirely improper.

14. I was not present at Bethune Precinct at any time on Election Day in 1964.

15. I have never been a member of Arizonans for America or For America. I have seen a newspaper clipping from a local newspaper in 1958 which indicates that I was one of four panelists who appeared at a meeting of Arizonans for America in 1958 to discuss the federal income tax. While I have no independent recollection of speaking at such a meeting, I have no reason to dispute the newspaper account.

(Signed) WILLIAM H. REHNQUIST.

○

APPENDIX B

200 Sortais Road
Durango, Colorado 81301
August 4, 1986

Senator Strom Thurmond, Chairman
Senate Judiciary Committee
Washington, D.C. 20510

SUBJECT: William H. Rehnquist's confirmation hearings.

Dear Senator Thurmond:

I am writing you this letter out of my concern that the true facts be known by your Committee concerning Judge Rehnquist's activities in Phoenix elections during the early 1960's. I was a resident of Phoenix during that interval and I was one of the Poll Watchers trained and organized by Mr. Rehnquist and his Republican Party Committee. I volunteered and served under Judge Rehnquist for the 1962 and 1964 elections.

In each election I had to go to a full evening training session conducted by Judge Rehnquist, several days before the election, in which he made us very familiar with the election laws of Arizona. He and his Committee also made very clear exactly how an election challange was to be made and on what basis it would be made.

Frankly, I was very impressed with the thorough training we got in the election laws in preparation for the election. Also, on the day of the election the Committee backed us up by giving us a special phone number to reach Committee members that could be used if a real problem developed at the precinct. It was my understanding that Judge Rehnquist was one of those standing by at the special telephone that would come to a precinct immediately if one of us should call for help.

It's very difficult for me to accept the testimony of people like Senator Edward Kennedy who alleged that Judge Rehnquist harassed and intimidated black and Hispanic voters in Phoenix as part of a State Republican Party ballot security program when he was playing the role I described above, i.e., he was available on call if we needed legal help at the precinct.

In fact, I was very impressed by the legal preparation he gave us and the well planned security program by the Republican Party---even to the point of sending out huge numbers of first class letters to Democrat polling lists to use the returned envelopes as challenges to those voters because their address was changed. No, Senator Thurmond, I do not agree that Judge Rehnquist should be criticized for his election security activities in Phoenix; rather, he should be given credit for organizing a very well informed organization that conducted a very fair poll watching activity during these elections. Never did I see anything in these activities that even suggested harassment or intimidation of any minority

voters. I feel so strongly on this subject that I would be very willing to give any testimony or answer any questions to support this position.

In digging through my files I have found some of the papers that were used for our preparation of Vote Challenging. I am enclosing copies of these papers for your information. Hand written notes on these are my notes from the training sessions. It's interesting that I should save these papers for over 20 years. But the answer is simple; I was so impressed with what I learned from his training sessions that I saved these papers for future reference. And I have used them a few times in these years.

I hope these views "from the trenches" of what really happened in Phoenix elections in the early 1960's, and Judge Rehnquist's involvement, will be helpful in giving you a more accurate picture of these events. If I can be of any further assistance please call on me Senator.

Respectfully yours,

Thorn Mayes Jr.

Thorn Mayes, Jr.

Phone # 303-259-0562

5:35 - 5:35 PM
2314 Cor
N 32 NP 54
Ref. 1104

AC 6 - 7611 ext 711 Voters Registration
254 - 1101 Phoenix Police
1962

INSTRUCTIONS TO CHALLENGERS

Call Rep. headquarters to see if voting booth has been changed (all Mon.) 274-59
274-618
274-80

INTRODUCTORY

Please remember that the great majority of election officials in Arizona are experienced, capable, unselfish men and women who are making every effort to conduct a fair and honest election. As long as you understand the mechanics and the basic legal principles of the election as they are described in these instructions, and as long as you are satisfied that the spirit of the law providing for a secret ballot is not being violated, you should avoid being officious or unduly technical. Your presence and friendly cooperation in assisting the Inspector in the conduct of the election in a practical manner will often be all that is necessary.

On the other hand, however, it is a matter of public record that there have been serious irregularities in the conduct of elections in some precincts in previous years. Some of these irregularities have been the result of ignorance or carelessness on the part of election officials, but some have clearly been the result of deliberate violations of the Election Code. These violations have in certain elections resulted in the improper influencing or recording of hundreds and thousands of votes. Therefore, you should not hesitate to insist on substantial compliance with the law. Be polite and firm. Do not allow yourself to be browbeaten.

GENERAL INSTRUCTIONS

A - You will need the following equipment:
- (1) A pencil or pen and notebook to record any important facts;
- (2) Your authorization paper from the Republican Party;
- (3) A check list of voters to challenge....supplied by the District or Precinct Chairman of the precinct in which you will work, or "return" envelopes supplied by the County-wide Challengers Committee;
- (4) A camera, if possible, with flash attachment or fast film;
- (5) Some sandwiches, cookies, thermos jug or other refreshments, so that you will not have to leave the polls for meals;
- (6) A roll or handful of dimes and a handy telephone so that you or our Party Representative can call Challenger Headquarters quickly in case of irregularities, or if you need help. (watch out for the old political trick of blocking the pay telephone...you should spot another phone before the 6:00 A.M. opening).

B - Be sure to write down enough facts about doubtful or clearly improper cases to enable you to make an affidavit at a later date. (Record names, time, what happened, who was present, place, etc.)

① Inspect voting machine for zeroes before start
② Check if absentee voters list has been recorded in voters list — also check if absentee has had letter returned — also sick vote

C - Your duties in watching for irregularities in this election are of the utmost importance. If for any reason you are not going to carry them out, you owe it to party and candidates running to phone John Conlan, Jr. at WH 5-1892, so we can appoint someone who will do the job.

D - If you notice any violations of the Election Code, or irregularities in the conduct of the election, or you are not able to persuade the persons involved to stop, or if any of the election officials refuse to comply substantially with the law, or any problem arises which you can't handle, you should telephone our Challenger Headquarters at once:

Telephone No. 254-5248, and identify yourself.

E - You may find that your task will become dull and uninteresting at times during the day, but you must continue to carry out your duties. If you fail to pay attention, get involved or distracted in lengthy conversations outside the polls, leave the polls for any length of time, you may make it possible for improper voting practices to take place. This is going to be a long and tiring day for you, but it is crucial to victory for our candidates in this election!

GROUNDS FOR CHALLENGE

Here are the grounds (ARS Sec. 16-921) for challenging a person's right to vote:

1. He is not the person whose name appears on the voting register.
2. He has not resided in the state for one year next preceding the election.
3. He has not resided in the county for 30 days next preceding the election.
4. He moved from the precinct prior to September 25th and has not reregistered.
5. He has voted before at the election.
6. He has been convicted of a felony and has not been restored to civil rights.
7. He has made a bet on the result of the election.

8. He is unable to read the constitution of the United States in the English language in such manner as to show he is neither prompted nor reciting from memory (unless his inability is caused by his physical condition).

9. He is unable to write his name (unless his inability is caused by his physical condition).

You can challenge on any one or on several of these grounds.

CHALLENGE PROCEDURE

A - When you should challenge:

Make your challenge and state your grounds just as soon as the voter's name is announced. to inspector or judges

B - What happens after you challenge:

1. As soon as you have made your challenge, the challenged voter must fill out, sign and swear to the same affidavit that is used when a person registers to vote--these "Affidavit of Registration" forms are a part of the election board's supplies. The oath has to be administered by the inspector or one of the judges or clerks of the election board. If the challenged voter refuses to fill out, sign and swear to the affidavit, he cannot vote. (ARS 16-924)

2. After the challenged voter has filled out, signed and sworn to the affidavit, he must take another oath to tell the truth in answering questions about your challenge. If he refuses to be sworn for this purpose, he cannot vote. (ARS 16-924)

3. The inspector must ask him the questions which bring out the grounds for your challenge, such as where he lives, how long he has lived there, whether he can read English, whether he can write his own name, etc., depending on the grounds of challenge. If he refuses to answer a question which is material to your challenge, he cannot vote. (ARS 16-924)

4. If your challenge is on the grounds that he cannot read the United States Constitution in English, the election inspector must require him to read some section of the Constitution. Some excerpts from the Constitution are attached to this Guide for you to furnish the inspector if he needs them. (ARS 16-924)

5. If your challenge is on the grounds that he cannot write his name, the election inspector must require him to sign his name. (ARS 16-924)

C - Who decides the challenge:

If the challenged voter has done all the things he is required to do as indicated above, his right to vote will be decided by a majority vote of the election board (ARS 16-924). The inspector and the two judges constitute the election board. Election board clerks cannot vote on a challenge.

D - What happens after your challenge is decided:

If a majority of the election board decides that the challenge is not good, the challenged voter will be allowed to vote. If the challenge is sustained, he cannot vote and if he has received a ballot it must be taken from him and destroyed by the inspector. (ARS 16-924)

E - Who keeps a record of the challenges:

One of the election board clerks must list (on yellow sheet) the name of each person challenged, the grounds of each challenge and the decision of the board on each challenge (ARS 16-926). You should keep a similar list for your own records in case the clerk fails to do his job correctly, and the Republican Party later decides to challenge that precinct's election results.

Why election officials should cooperate in the handling of your challenges:

The law spells out clearly the duties of the election officials, particularly the inspector, when a voter is challenged. The law also provides a penalty for failure of election officials to perform their duties. If election officials fail or refuse to cooperate respecting challenging, read the following penalty provision to them. (Arizona Revised Statutes):

"16-1310. Refusal by election officer to perform duty; violation of election law; penalty

A person charged with performance of any duty under any law relating to elections who refuses to perform such duty, or who, in his official capacity, knowingly and fraudulently acts in violation of any provision of such law, shall, unless a different punishment for such act or omission is prescribed by law, be punished by a fine not exceeding one thousand dollars, by imprisonment in the state prison for not to exceed five years, or both."

IMPORTANT PROVISIONS OF THE ARIZONA REVISED STATUTES

ARTICLE II. CHALLENGING VOTERS

Sec. 16-921. Grounds for challenging voter

A person offering to vote may be orally challenged by any registered elector of the county upon any of the following grounds:

1. That he is not the person whose name appears upon the register.
2. That he has not resided within the state for one year next preceding the election.
3. That he has not resided within the county or precinct for thirty days next preceding the election.
4. That he has voted before at that election.
5. That he has been convicted of a felony and has not been restored to civil rights.
6. That he has made a bet on the result of the election.
7. That not being prevented by physical disability from doing so, he is unable to read the constitution of the United States in the English language in such manner as to show he is neither prompted nor reciting from memory, or he is unable to write his name.

Sec. 16-922. Challengers representing political parties

At each voting place, one challenger for each political party may be present and act, but no challenger may enter a voting booth except to mark his ballot.

Sec. 16-923. Appointment of challengers

The precinct committee of each party in each precinct may, by written appointment addressed to the election board, designate a party agent or representative and an alternate for a polling place in the precinct who may act as challenger for his respective party.

Sec. 16-924. Proceedings on challenge; disposition of ballot; failure to be sworn or answer

A. Upon challenge being made, the person challenged, if he appears to be registered, shall take and subscribe to the oath prescribed in the "Affidavit of Registration" and, if he so elects, may be at once sworn to answer fully and truly all questions material to the challenge as are put to him by the inspector. If the challenge is upon paragraph 7 of Sec. 16-921, the party challenged shall be required to read any section of the constitution of the United States designated by the inspector and may be required to write his name.

B. If after the examination on the challenge, a majority of the election board is satisfied that the challenge is not valid, the person challenged shall be permitted to vote, otherwise not, and the ballot, if he has received one, shall without examination be at once destroyed in his presence by the inspector.

C. If the person challenged refuses to be sworn or affirmed, or refuses to answer questions material to the challenge, he shall not be allowed to vote.

Sec. 16-925. Rules determining residence of voter upon challenge; reading of rules upon request

A. The election board, in determining the place of residence of a person, shall be governed by the following rules, so far as applicable:

1. The residence of a person is that place in which his habitation is fixed, and to which he has the intention of returning when absent.

2. A person does not gain or lose his residence by reason of his presence at or absence from a place while employed in the service of the United States or of this state, or while engaged in navigation, or while a student at an institution of learning or while kept in an almshouse, asylum or prison.

3. A person does not lose his residence by leaving his home to go to another county, state or foreign country for merely temporary purposes, with the intention of returning.

4. A person does not gain a residence in any county into which he comes for merely temporary purposes, without the intention of making that county his home.

5. If a person removes to another state with the intention of making it his residence, he loses his residence in this state.

6. If a person removes to another state with the intention of remaining there for an indefinite time, and of making the place his present residence, he loses his residence in this state, even though he has an intention of returning at some future period.

7. The place where a man's family permanently resides is his residence, unless he is separated from his family, but if it is a place of temporary establishment for his family, or for transient purposes, it is otherwise.

8. If a man has a family residing in one place and he does business in another, the former is his place of residence, but a man having a family who has taken up his abode with the intention of remaining and whose family does not so reside with him, shall be regarded as a resident where he has so taken up his abode.

9. The mere intention of acquiring a new residence without the act of removal avails nothing and neither does the act of removal without the intention.

B. The term of residence shall be computed by including the day on which the person's residence commenced, and by excluding the day of election.

C. Before administering an oath to a person touching his residence, the inspector shall, if requested by any person, read to the person challenged the rules set forth in subsection A of this section.

Sec. 16-926. List of challenges, grounds and rulings

The board shall require one of the clerks to keep a list of the names of all persons challenged, the grounds of the challenge and the determination of the board upon the challenge.

Sec. 16-896. Occupation of voting booth by voter

A voter shall not be allowed to occupy a voting booth for more than five minutes when other voters are waiting to occupy the booth.
2 minutes for machines

Sec. 16-898. Election officer ascertaining or disclosing elector's vote; penalty

A. An officer of an election is guilty of a misdemeanor, who:

1. Previous to depositing the ballot of an elector in the ballot box, attempts to find out for whom the elector has voted.

Sec. 16-899. Election officer changing vote of elector by menace or reward; penalty

An officer of an election, who, while acting as such, induces or attempts to induce an elector, either by menace, reward or promise thereof, to vote differently than the elector intended or desired to vote, is guilty of a felony.

Sec. 16-901. Illegal voting; pollution of ballot box; removal or destruction of ballot box, poll lists or ballots; penalty

A person is guilty of a felony who:

1. Not being entitled to vote, fraudulently votes.
2. Votes more than once at any election.
3. Knowingly gives to an election official two or more ballots folded together.
4. Changes or destroys a ballot after it has been deposited in the ballot box.
5. Adds or attempts to add a ballot to those legally cast at any election, by fraudulently introducing the ballot into the ballot box either before or after the ballots therein have been counted.
6. Adds to or mixes with, or attempts to add to or mix with, ballots lawfully cast, other ballots, while they are being canvassed or counted, with intent to affect the result of the election, or to exhibit the ballots as evidence on the trial of an election contest.
7. Unlawfully carries away, conceals or removes a poll list, ballot or ballot box from the polling place, or from possession of the person authorized by law to have custody thereof.
8. Destroys or attempts to destroy a polling list, ballot or ballot box for the purpose of interrupting or invalidating the election.
9. Wilfully detains, alters, mutilates or destroys ballots or election returns.
10. Aids, counsels, procures, advises or assists any person to do any act prohibited by this section.

16-534-4A — Illegal marking to poll watch. Handle can get assistance — 2 judges — one each party. Confusion of petition gets no assistance

Sec. 16-902. Unlawful acts by voters with respect to voting; penalty

A voter who commits any of the following acts is guilty of a misdemeanor punishable by a fine not exceeding fifty dollars, or by imprisonment in the county jail for not to exceed fifty days:

1. Allows his ballot to be seen by another person with the intention of disclosing how he is about to vote.
2. Makes a false statement as to his inability to mark his ballot.
3. Interferes with a voter within the fifty-foot limit of the polling place as posted by the marshal of election.
4. Endeavors while within the fifty-foot limit to induce a voter to vote for a particular candidate.
5. Prior to the close of an election wilfully defaces or destroys a sample ballot posted by election officers, or defaces, tears down, removes or destroys a card of instructions posted for the instruction of voters.
6. Removes or destroys supplies or conveniences furnished to enable a voter to prepare his ballot.
7. Wilfully hinders the voting of others.

Sec. 16-903. Unlawful acts by persons with respect to voting; penalty

A person who commits any of the following acts is guilty of a misdemeanor punishable by imprisonment in the county jail for not less than one nor more than six months:

1. Electioneers on election day within a polling place or in a public manner within one hundred fifty feet of a polling place.
2. Hands out or offers to hand out a candidate's cards or political literature on the day of an election, other than publicity pamphlets on initiated and referred measures, the distribution of which at the polls is required by Sec. 19-123.
3. Removes an official ballot from a polling place before closing the polls.
4. Shows his ballot to any person after it is prepared for voting in such a manner as to reveal the contents.
5. Solicits a voter to show his ballot, or receives from a voter a ballot prepared for voting, unless he is the inspector of election.
6. Receives an official ballot from a person other than one of the judges having charge of the ballots, unless a judge of election.
7. Delivers an official ballot to a voter, unless a judge of election.
8. Places a mark upon his ballot by which it can be identified as the one voted by him.
9. After having received a ballot as a voter fails to return the ballot to the inspector of election or judge of election acting as such inspector before leaving the polling place or going outside the guard rail.

Sec. 16-159. Impersonation; penalty

A county recorder, deputy registration officer, inspector, judge or clerk of election, or justice of the peace, who wilfully disregards any provision of this chapter, or a person who wilfully or fraudulently registers more than once, or registers under any name other than his true name, or attempts to vote by personating another who is registered, or knowingly registers in a precinct where he is not a resident at the time of the registration, shall be punished by imprisonment in the state prison for not less than one nor more than three years, by a fine of not less than one hundred nor more than two thousand dollars or both.

Sec. 16-862. "Fifty-foot limit" notices; posting; penalty for violation

A. The board of supervisors shall furnish with the ballots for each polling place, three notices, printed on muslin in letters not less than two inches high, reading: "Fifty-foot limit" and underneath that heading the following:

"No person shall be allowed to remain inside these limits while the polls are open, except for the purpose of voting, and except the election officials, one representative of each political organization represented on the ballot, appointed by the chairman of the local committee of such political organization, and the challengers allowed by law. Voters having cast their ballots shall at once retire without the fifty-foot limit. A person violating any provision of this notice is guilty of a misdemeanor."

B. Before opening the polls, the election marshall shall post three fifty-foot limit notices approximately fifty feet, in different directions, from the entrance of the place in which the election is being held.

C. Any person violating any provision of the fifty-foot limit notice is guilty of a misdemeanor.

Sec. 16-892. Poll lists to be kept by election clerk; posting

A. Each election board clerk shall keep a list in duplicate of persons voting, and the name of each person who votes shall be entered thereon and numbered in the order of voting.

B. The poll list shall be written on one side only, and the copies thereof shall be legible carbon copies. Immediately upon the completion of each page of the poll list one copy shall, upon request, be given to a representative designated by each major political party.

EXCERPTS

CONSTITUTION OF THE UNITED STATES

Preamble

We, the People of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article 1, Section 10. (Powers Denied the States)

(1) No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Article 2, Section 4. (Impeachment)

The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARIZONA GENERAL ELECTION MANUAL FORM B

FORM OF APPOINTMENT OF PARTY REPRESENTATIVE

ELECTION BOARD

Sky Harbor Precinct

The following named persons:

T. L. Mayes

are hereby appointed as representatives of the Republican Party for the above-named precinct any one of whom may be present within the polling place of said precinct while the polls are open and may remain inside the guard rail from the time the polls are closed until the completion of the canvass of the votes, for the purpose of inspecting the ballots as they are read and the tally lists as the votes are tallied and counted.

These appointments are made pursuant to the Arizona Revised Statutes Section 923 & 16-943.

Chairman, Republican County Committee

Precinct Committeeman

J. L. Carter

District Chairman

A GUIDE FOR ELECTION DAY CHALLENGERS

You have been named to represent the Republican Party as a challenger at the polls on Election Day, November 3, 1964. This is a very important job. The outcome of the election may depend on your performance -- elections have been "stolen" by the use of ineligible voters -- you must know your job and challenge promptly when an ineligible person shows up to vote.

GROUNDS FOR CHALLENGE

Here are the grounds for challenging a person's right to vote:

1. He is not the person whose name appears on the voting register.
2. He has not resided in the state for one year next preceding the election.
3. He has not resided in the county for 30 days next preceding the election.
4. He moved from the precinct prior to September 22nd and has not re-registered.
5. He has voted before at the election.
6. He has been convicted of a felony and has not been restored to civil rights.
7. He has made a bet on the result of the election.
8. He is unable to write his name (unless his inability is caused by his physical condition).

You can challenge on any one or on several of these grounds.

CHALLENGE PROCEDURE

When you should challenge:

Make your challenge and state your grounds just as soon as the voter's name is announced.

What happens after you challenge:

1. As soon as you have made your challenge, the challenged voter must fill out, sign and swear to the same affidavit that is used when a person registers to vote -- these "Affidavit of Registration" forms are a part of the election board's supplies. The oath has to be administered by the inspector or one of the judges or clerks of the election board. If the challenged voter refuses to fill out, sign and swear to the affidavit, he cannot vote.

2. After the challenged voter has filled out, signed and sworn to the affidavit, he must take another oath to tell the truth in answering questions about your challenge. If he refuses to be sworn for this purpose, he cannot vote.

3. The Inspector must ask him the questions which bring out the grounds for your challenge, such as where he lives or how long he has lived there, depending on the grounds of challenge. If he refuses to answer a question which is material to your challenge, he cannot vote.

4. If your challenge is on the grounds that he cannot write his name, the election inspector must require him to sign his name.

Who decides the challenge:

If the challenged voter has done all the things he is required to do as indicated above, his right to vote will be decided by a majority vote of the election board. The inspector and the two judges constitute the election board. Election board clerks cannot vote on a challenge.

What happens after your challenge is decided:

If a majority of the election board decides that the challenge is not good, the challenged voter will be allowed to vote. If the challenge is sustained, he cannot vote and if he has received a ballot it must be taken from him and destroyed by the inspector.

Who keeps a record of the challenges:

One of the election board clerks must list the name of each person challenged, the grounds of each challenge and the decision of the board on each challenge. You should keep a similar list in case the clerk fails to do his job correctly.

Why election officials should cooperate in the handling of your challenges:

The law spells out clearly the duties of the election officials, particularly the inspector, when a voter is challenged. The law also provides a penalty for failure of election officials to perform their duties. In case you have occasion to remind an election official of his or her obligation to cooperate, here is what the law says (Arizona Revised Statutes):

"16-1310. Refusal by election officer to perform duty; violation of election law; penalty

A person charged with performance of any duty under any law relating to elections who refuses to perform such duty, or who, in his official capacity, knowingly and fraudulently acts in violation of any provision of such law, shall, unless a different punishment for such act or omission is prescribed by law, be punished by a fine not exceeding one thousand dollars, by imprisonment in the state prison for not to exceed five years, or both."

IMPORTANT

You cannot do a thorough job as a challenger unless you have gone through the precinct register before election day and found out from people who know the district well which persons on the list may be subject to challenge and the grounds for challenging them. Check with your legislative district chairman and your precinct captain to become familiar with those challengable names.

APPENDIX C

2000-5-0
Rev. 1-80

CITY OF PHOENIX, ARIZONA
POLICE DEPARTMENT

MISCELLANEOUS COMPLAINT
OR CRIME REPORT

1. Date & Time Rptd to PD: 2:45 pm 11-6-62	2. Type of Report: SIMPLE ASSAULT		3. D.R. Number: 62 37576
4. Date & Time Crime Occurred: 2:40 pm 11-6-62	5. Location of Occurrence: 15 Avenue and Pima	Bethune	6. Target Date: School
7. Victim's Name (First name if business): MARIA C. BENTSON	8. No. Adv. (Occ. Occ. if Firm): 3550 West Baldoo Lane	City	9. Res. Phone: YL 94707 / 10. Bus. Phone: same
11. Person Reporting Crime to PD: OV	12. No. Adv.	City	13. Res. Phone / 14. Bus. Phone
15. Person who Discovered Problem or Vehicle:	16. No. Adv.	City	17. Res. Phone / 18. Bus. Phone
19. Person who Witnessed Crime: OV	20. No. Adv.	City	21. Res. Phone / 22. Bus. Phone
23. Witness Name:	24. No. Adv.	City	25. Res. Phone / 26. Bus. Phone
27. Victim's Occupation: Construction	Sex: M	Race: W	Age: 31
28. Identifying Data Verified & Person Contacted: 810 - 81 - 88 - 99			
29. Type of Premises: voting polls	30. Location of Premises:	31. Point Where Entered and How:	
32. Method Used to Gain Entrance:	33. Weapon or Force Used (Describe): fist	34. Apparent Motive: political differences	
35. Type of Property Taken:	36. Vehicle Taken Which Followed: Type:	Year:	Make: Body Type: License No.:
37. Suspect(s): Number: 2	Sex: M	Race: W	38. Description of Suspect(s): (Address in confidence) Detained victim, hit with fist
39. Vehicle Used by Suspect(s): Year:	Make: Body Type:	Color:	License No.: Identifying Characteristics:
40. Suspect: Sex: M	Race: W	Age: 45	Height: 5'7 / Weight: 220 / Build: Med / Eyes: Brn / Hair: Brn / Complex.: Heavy / Glasses: Med / Identifying Marks: White ss shirt, black pants
Name: Frank Delise	Address: 3913 West Cambridge		Phone Number:

Page No. 1

(32) Reconstruct the crime. (34) Describe physical evidence and location found. Give dispositions. (36) Describe other objects related to crime. (39) Describe, describe and show value of property taken, listing all serial numbers.

Suspect #2 M W 36 6' 220 Brn Brn Heavy Med Blue/green sportcoat, blue T shirt, black pants, Peter Marino 6439 South 4 Avenue

At approximately 2:40 pm. 11-6-62, Mr. Bentson was accousted by suspects Delise and Marino, held by Marino and struck in the stomach by suspect Delise.

Mr. Bentson related to officer that he had gone into a room off of the main hall where the voting registrars' are to made a phone call due to an argument which was taking place. As he was making his call he said the two suspects, Delise and Marino entered and attempted to engage him in conversation. Mr. Bentson said he attempted to leave the room but was blocked at the door by Marino who stripped his arm through his and around him, preventing him from leaving. Mr. Bentson said he at this time took a swing at Marino attempting to get away, but was swung around into the corner of the room and held by Marino. While being held by Marino, suspect Delise hit Mr. Bentson in the stomach.

At approximately this time Delise was hitting Mr. Bentson, the Polling Marshall hearing the conviction entered, on seeing the fight in progress, she had the police called. Several units were near and responded to a call by Car 81 to the scene. Mr. Bentson was advised to contact the Court Liason officer at 9 am 11-7-62 in regards to signing a complaint against Delise and Marino.

If additional space is required, use Supplementary Report Form 2000-7-0 — Total Value $

Date & Time Typed: 11-6-62 7:17p	Officer Assigned: M. Bowman	Serial No.: 646	Person Reporting Crime (Disclosure):
Approved: Lt. L. Gudgen	Serial No.: 824		

CITY OF PHOENIX, ARIZONA
POLICE DEPARTMENT

[illegible]
Rev. 11, 60

SUPPLEMENTARY REPORT

1. Date & Time Rptd to PD	2. Type of Report	3. D.R. Number
11/8/62, 1:00 PM	SIMPLE ASSAULT	62-37576
4. Date Crime Occurred	5. Location of Occurrence	
11/6/62, 2:40 P.M.	15th Ave. & Pima; [illegible]	
7. Victim's Name (From Name if Co.)	8. Res. Add. (No., Apt., St. Name) City	9. Res. Phone
[illegible], Wayne C.	3550 West Seldon Lane	YE 9-4707

Item No.	

Mrs. Bessie Sass, who was the marshal on duty in the polling booth located at 15th Avenue and Pima was contacted at her home, 1213 South 12th Avenue. Mrs. Sass gave the following information:

While she was on duty in the polling booth, two white males walked into the booth. She did not know who they were, but described them as one being a tall, large man, and the other as a short, heavy set man. When these subjects walked into the polling area, a Mr. Wayne C. Bentson, who was also on duty at the polling booth in the capacity of a challenger for the Republican Party, stated that he was going into the nurses' room and make a phone call. After he had entered the room, the two men followed him into the room and closed the door. Within a short time, Mrs. Sass heard a commotion inside the nurses' room and, therefore, opened the door. As she looked into the room, the tall, well-built man had Mr. Bentson around the neck, holding him while the shorter, heavy set man was hitting Mr. Bentson in the stomach. She believes that the short man hit Mr. Bentson at least two times while she was in the room. At this time she ran around behind the taller man and locked her arms around him, pulling him [illegible]wards. This stopped the fight and at this time the police came in. Mrs. Sass also said that she did not see who struck the initial blow, but that the fight had already started before she opened the door and looked inside.

Mr. Peter Morino was interviewed at his home, 6439 South 4th Avenue, and he gave the following of the incident that occurred in the polling booth.

During the election day, 11/6/62, he was on duty at the Democratic Headquarters. During the morning hours, they had received several complaints from the polling [illegible] area at 15th Avenue and Pima. At one time the City Police with the Sheriff's Department and, also, an agent from the FBI were dispatched to this area to check to see what the difficulty was. Several voters had come into the Headquarters and reported that someone was challenging everyone and the voting situation there was very slow. After the officers were dispatched to this polling place, things seemed to straighten out for a period of time. Then, shortly after 12:00 P.M., Mr. LaJoy, who was in charge of the Democratic Headquarters, dispatched Mr. Morino and Mr. Delise to the polling area at 15th Avenue and Pima to see what the problem was at that time. Numerous other complaints had started to come into the Democratic Headquarters. Upon their arrival at the polling headquarters, Mr. Delise and Mr. Morino asked the Democratic representative there was the problem was and he stated that the Republic challenger, Mr. Bentson, had been causing a disturbance again by stopping everyone in the line and challenging them. While they were talking to their representative, there was an argument in the voting line between a colored female and another voter. When Mr. Morino asked their representative what the problem was and who the woman was involved in

Date & Time Typed	Typed	Checked	Officer(s) Assigned	Serial No.	Person Reporting (Dictated)
11/9/62 7:35 AM	DST	a269	R. Golden	751	NEXT PAGE, PLEASE
Supervisor Approving		Serial No.			

CITY OF PHOENIX, ARIZONA
POLICE DEPARTMENT

SUPPLEMENTARY REPORT

1. Date & Time Rptd to PD	2. Type of Report	3. D.R. Number
11/8/62, 1:00 PM	SIMPLE ASSAULT	62-37576
4. Date Crime Committed	5. Location of Occurrence	
11/6/62, 2:40 P.M.	15th Ave. & Pima; Bethune School	
7. Victim's Name (First Name if Business)	8. Res. Add. (Bus. Add. if Firm) City	9. Res. Phone / 10. Bus. Phone
BENTSON, Wayne C.	3350 West Seldon Lane	XK 94707

ITEM NO.

Continued On - Page 2.

the argument, she was identified as Mrs. Sass, the marshal at the polling place. Mr. Delise and Mr. Morino gave this incident no further thought, but then their representative advised them that Mr. Bentson was in the nurses' quarters making a telephone call to someone, but he did not know to whom. At this time, both Mr. Delise and Mr. Morino walked into the nurses' quarters and closed the door behind them. Mr. Bentson was observed on the telephone, talking to someone. Both subjects stood by and waited until he had completed his conversation. After hanging up the telephone, Mr. Bentson then walked toward Mr. Morino. At this time Mr. Morino stated to him that they were representatives from the Democratic Headquarters and would like to talk to him about slowing up the voting line. Mr. Bentson told them that they had no business questioning him and pushed Mr. Morino so hard that he went into the door, causing it to open. At this time, Mr. Morino grabbed Mr. Bentson around the waist, attempting to hold him. With this, Mr. Bentson struck Mr. Morino in the left lower portion of the jaw. While officer was talking to Mr. Morino, he showed officer a small bruise on the outside of his jaw and, also, on the inside of the lip there was considerable bruising to that area.

Mr. Frank Delise then tried to assist Mr. Morino in subduing Mr. Bentson to refrain from any more violence, but, at this time, Bentson then took a poke at Mr. Delise, who, in turn, while Mr. Morino was holding Bentson, struck Mr. Bentson in the stomach. Mr. Morino does not know whether he did this once or twice.

After this, the police arrived and the fight stopped. Mr. Morino further related that, while the police were there (Phoenix City Police) and a representative from the office of the County Attorney, Mr. Bentson made the statement that he did strike Mr. Morino he believed and, if he did not, he sure wished that he had.

Mr. Morino feels that this is a most unfortunate incident, which could have been avoided if all subjects had hesitated long enough to talk this thing out.

Mr. Frank Delise came into the Detective Bureau at 2:30 P.M., 11/8/62, to discuss this case. Mr. Delise lives at 3913 West Cambridge and has been in Phoenix since 1948. He is in the insurance business and works from his home, phone AM 8-1693.

During the day of 11/6/62, Mr. Delise had been staying at the Central Headquarters for the Democratic Party. He was assisting in getting out the voters. Headquarters had received several calls from the polling place at Bethune School regarding a man named Wayne who was challenging the democratic voters and causing quite a bit of trouble.

Delise said that he and Morino went to the school to talk to Wayne and attempt to get him to quit harrassing the voters.

TOTAL VALUE $

Date & Time Typed	Dictated	Typed	Officer(s) Assigned	Badge No.	Person Reporting (Signature)
11/9/62 7:54 A	DET	a269	R. Golden	751	NEXT PAGE, PLEASE
Supervisor Approving		Badge No.			

CITY OF PHOENIX, ARIZONA
POLICE DEPARTMENT

2000-14
Rev. 11, 66

SUPPLEMENTARY
REPORT

1. Date & Time Reported (Month, Day, Year, Hour) 11/5/66, 1:50 P.M.	2. Type of Report	3. Case No. 62-[illegible]5
4. Date & Time Occurred 11/6/66, 2:10 P.M.	5. Location of Occurrence 15th Ave. & [illegible] Bethune School	
6. Victim's Name (Last, First, Middle) BENTSON, Wayne C.	8. Res. Add. (Bus. Add. if none) Street 3550 West Selden Lane	9. Res. Phone YE 94707

Item No.

Continued - Page 3.

When they arrived, they asked for Wayne and were told he was in another room making a telephone call. As they entered this room, Wayne Bentson was talking on the telephone, so they waited until he finished. When Bentson finished his phone call, Morino said, "We want to talk to you about the trouble you are having down here." Bentson replied, "I haven't got time." He turned to walk out the door and ran into Morino. Some blows were exchanged between Morino and Bentson; however, Dalise said he could not see who threw the first punch. Bentson then turned and went toward Dalise and was swinging his fists at him. Dalise said he also took a few swings at Bentson and about that the police arrived. Dalise said his only intention in going to the school was to try to talk to Bentson. He did not have any idea of becoming involved in any type of fight or using an[illegible]violence.

PENDING.

Date & Time Typed: Init. Class: 11/9/66 7:58 A [illegible] 2869	Officer(s) Assigned: R. Golden	Badge No.: 731
Supervisor Reviewed: Badge No.		Person Reporting (Signature)

TOTAL VALUE: 0

2000-10
Rev. 11, 60

CITY OF PHOENIX, ARIZONA
POLICE DEPARTMENT

SUPPLEMENTARY REPORT

1. Date & Time Occ. or Rptd.	2. Type of Report	3. D.R. Number
11-24-62	SIMPLE ASSAULT	62-97776
4. Date Report Received	5. Location of Occurrence	
2:40 pm 11-6-62	15th Ave. & Pima, Maricopa County	
7. Victim's Name (Last Name, First, Middle)	8. Res. Add. (Bus. Add. or Firm) City	9. Res. Phone / 10. Bus. Phone
WAYNE C. BENTSEN	9220 W. Golden Lane	YE 94707 / none

ITEM NO.

Mr. Bentsen said that after seeing his attorney he would decide if he wanted to sign a complaint. Several days have past and Mr. Bentsen has not made an effort to contact this Department. This report is exceptionally cleared.

EXCEPTIONALLY CLEARED

TOTAL VALUE 0

Date & Time Rptd.	Officer(s) Assigned	Badge No.	Cross Reference (Indexing)
11-24-62 9:39 am Sat. 0209	R. Golden	753	(1254)
Supervisor Approving	Badge No.		

CITY OF PHOENIX, ARIZONA
POLICE DEPARTMENT

SUPPLEMENTARY REPORT

1. Date & Time Occ to Rptd	2. Type of Report	3. D.R. Number
11/15/62	SIMPLE ASSAULT	62-51976
4. Date Card Received	5. Location of Occurrence	
11/6/62, 8:40 P.M.	15th Ave. & Pima; Bethune School	
7. Victim's Name (First name or initials)	8. Res. Add. (Bus. Add. if firm) City	9. Res. Phone / 9. Bus. Phone
BETHUNE, Thyrne G.	3550 W. Baldon Lane	AM 9-4707 / Home

ITEM No.

This report was reviewed by City Prosecutor Vern Crouff, who then discussed it with the victim and refused to issue a complaint.

EXCEPTIONALLY CLEARED.

TOTAL VALUE | 0

Date & Time Rptd	Disp.	Status	Officer(s) Assigned	Badge No.	Person Reporting (Prosecutor)
11/15/62 11:30 A		CLSD	Sgt. Carl Marlatt	186	
Supervisor Approving		Badge No.			

ADDITIONAL VIEWS OF MR. MATHIAS

No responsibility entrusted to the U.S. Senate is more important than the duty to participate in the process of selecting the judges of the U.S. courts. The nomination of a new Chief Justice of the United States is, of course, particularly consequential. The Senate's decision on this nomination will have a direct effect not only upon the day-to-day operations of the Supreme Court, but upon the work of every Federal court in the land well into the nation's third century.

In my view, the nomination of Justice Rehnquist requires an analysis sensitive to the specific responsibilities of a Chief Justice. We know that Justice Rehnquist has the intellectual ability to be the Chief Justice. The U.S. Reports for the last 15 years amply show it. But this office deserves more. The Chief Justice must provide leadership and direction to an institution that, by its very nature, is often sharply divided. In this regard, it has been comforting to learn that Justice Rehnquist has the support of his colleagues on the Court. They seem to think he has what it takes to be the "first among equals."

Justice Rehnquist also seems prepared to take on the duties reposed in the Chief Justice as head of the Judicial Branch. He has a thoughful approach to a wide range of topics of importance to the administration of justice. Chief Justice Burger set a high standard in this area, but Justice Rehnquist is qualified to meet it.

Of course, it is not possible for a Senator to ignore several issues that clouded the confirmation of this nominee. The allegations that Justice Rehnquist intimidated voters are disturbing. But nearly a quarter of a century after the events at issue, the extensive testimony concerning those events probably tells us more about the uncertainties of human memory than about the nominee's veracity and fitness for office.

The restrictive covenants in Justice Rehnquist's deeds were also troubling. Every allegation concerning Justice Rehnquist's sensitivity toward racial issues would have been less knotty had the Justice instructed his attorneys to have the covenants removed from the Arizona and Vermont deeds before he accepted them. It gave little comfort to hear him testify that the convenants are "obnoxious" and "unenforceable as a matter of law." But many Americans will find a similar blot on deeds that they or their families have given or received. I concluded that inattention, not insensitivity, best explains Justice Rehnquist's situation.

Finally, I address an issue that one of my colleagues raised in the opening moments of this confirmation hearing. Surely our Nation's laws would be quite different had Justice Rehnquist's views—often expressed alone—been joined by a majority of the Court. In my view, the Nation is fortunate that some of Justice Rehnquist's opinions did not command a majority. But my distaste

for some of his opinions cannot be conclusive of my vote on this nomination, for two reasons.

First, Justice Rehnquist will continue to express his views—in the majority or in dissent—as a member of the Supreme Court. It may make a difference which chair he occupies. But we should not exaggerate how much of a difference it makes.

Second, respect for the principle of judicial independence should make us reluctant to lean too heavily on the decisions a Federal judge has rendered. The framers of the Constitution knew that an independent judiciary is incompatible with any attempt by the political branches of government to hold a judge personally accountable for his rulings. Certainly a judge's behavior on the bench may demonstrate that he is unfit for a more responsible position, whether due to lack of competence, judicial temperament, or respect for the reasonable bounds of constitutional discourse. But none of these factors is present in this case.

The Senate Judiciary Committee voted 13–5 to recommend to the Senate that the nomination be confirmed. Based on the record before the Committee at that time, I concluded that Justice Rehnquist has the ability to serve effectively as Chief Justice, and therefore I voted with the majority of my colleagues.

CHARLES MCC. MATHIAS.

MINORITY VIEWS OF MESSRS. BIDEN, KENNEDY, METZENBAUM, LEAHY, AND SIMON

The confirmation of a Chief Justice of the United States is perhaps the most important vote on a Presidential nomination ever required of the Senate. It is the only case in our constitutional system of Government in which two branches of Government are required to choose the head of the third branch. The appointment is for life. The holder of the office is entrusted with awesome and difficult responsibilities, critical to the well-being of the Nation.

A nominee for Chief Justice must embody the highest standard of integrity, ethical responsibility and fidelity to law. He or she must have demonstrated exceptional legal ability and sound judgment. Finally, the Senate must consider how the nominee would lead the Court and how such leadership might affect the fundamental constitutional principles upon which our Government is based.

In this case, there is no doubt about the legal ability and competence of the nominee. Nevertheless, the hearings raised a number of serious concerns about the appropriateness of Justice Rehnquist for the office of Chief Justice. In particular, questions were raised about his credibility, his commitment to equality and racial justice, his decision to participate in the resolution of certain litigation before the Supreme Court, and his commitment to fundamental constitutional values. In the following statements, each of us has set out the concerns that are of primary importance in our individual decision to oppose the nomination. While each of us has come to this decision through his own evaluation, we are united in our conclusion that the Nation will be best served if this nomination is rejected.

JOSEPH BIDEN.
EDWARD KENNEDY.
HOWARD METZENBAUM.
PATRICK J. LEAHY.
PAUL SIMON.

SUPPLEMENTAL VIEWS OF MR. BIDEN

The decision to confirm a new Chief Justice of the U.S. Supreme Court will determine the leader of the third and co-equal branch of our Government—a position of awesome responsibility, sensitivity and importance to our future as a Nation. Only 15 men have presided over the Court, and they have shaped our destiny as distinctly as any who have served as President or as leaders in the Congress. It is one of our highest duties as Senators to advise and consent to this nomination.

In any nomination, whether to the Supreme Court or a lower judicial position, a threshold question for me is whether or not the nominee adheres to a judicial philosophy that would unravel the broad fabric of settled constitutional law and practice. From the fight over the nomination of John Rutledge in 1795—which centered on his speeches against the then-controversial Jay Treaty—through more contemporary struggles over the nominations of Louis Brandeis, Judge John Parker and Abe Fortas, the Senate has often considered a nominee's judicial philosophy and vision of the Constitution. I believe that a nominee for Chief Justice, or even Associate Justice, should be rejected if his or her presence on the Court would severely disrupt the delicate process of constitutional adjudication.

While technically Justice Rehnquist's decisions do not indicate that he has rejected the basic fabric of contemporary constitutional law, he made no effort in the confirmation hearings to allay legitimate concerns that he might wish to move the Court away from these fundamental and respected constitutional doctrines.

This is most troublesome in this case because the nominee has not simply been named to a position as Associate Justice, but is instead being elevated to the highest judicial position in the land—that of Chief Justice of the U.S. Supreme Court.

The Chief Justice plays a unique role in our national Government and uniquely symbolizes our image as a Nation. A Chief Justice not only serves longer than a President, but he and his colleagues exercise power limited only by their conscience and principles. And that power goes to the very heart of our Nation as a republic—whether we will be a government of laws or men.

Our national history has confirmed the central role of the Chief Justice in the major changes that have swept our society over the past 200 years. But beyond any one decision or another is the symbolic place the Chief Justice holds in our scheme of constitutional government. More than any other individual, the Chief symbolizes the guarantee of "Equal Justice Under Law" for all Americans. That is not just an arcane legalism; it is the embodiment of the fundamental purpose of our entire judicial system. The Chief Justice stands as a metaphor for justice in our society.

Unfortunately, in the hearings Justice Rehnquist was personally unconvincing as to whether he would be willing or able to fulfill the symbolic role of Chief Justice. Three requirements seem necessary for the Chief Justice as the leader of the Court and the head of our judicial system.

First, he must exhibit the capability and willingness to forge a consensus for a unanimous opinion in watershed decisions, such as Justice Warren did in *Brown* v. *Board of Education.*

Second, he must demonstrate the flexibility and openmindedness to put aside his own philosophical or legal views when consensus is required, as exemplified by Chief Justice Burger in the *Nixon* tapes case. When questioned about those two important cases, Justice Rehnquist acknowledged that a consensus, indeed a unanimous opinion, was required to insure compliance with the Court's decision and public respect for the law. However, there is nothing in his record as a sitting justice nor in the hearing record to indicate that he would be willing or capable to exercise this kind of leadership.

The third requirement is that the Chief Justice not only be perceived by the American people as fair and openminded, but also candid and forthright. They expect that this individual, above all others, exemplify this characteristic. Unfortunately, Justice Rehnquist's performance in the confirmation hearings did anything but enforce this perception. In areas in which I questioned Justice Rehnquist pertaining to the sensitive issue of race and gender discrimination, his answers on the record are, at best, incomplete.

The first area of concern involves his actions prior to coming to the Court; that is, his clerkship for the late Justice Robert Jackson, his views about the *Brown* v. *Board of Education* case, and the voter intimidation allegations concerning his election-day activities in Phoenix, Arizona. The second area concerns his actions as a member of the Court over the past 15 years, especially whether he has an open mind with regard to the application of the fourteenth amendment in race and gender discrimination cases. In each of these areas, the record is incomplete or his answers were not sufficiently forthcoming to satisfy the burden on every nominee to justify his or her confirmation.

For these reasons, I will vote against the nomination of William Rehnquist to be the 16th Chief Justice of the U.S. Supreme Court. While I am well aware that he will remain on the Court, I believe the Nation would best be served if he remains one among nine, rather than the "first among equals."

JOSEPH BIDEN.

SUPPLEMENTAL VIEWS OF MR. KENNEDY

The confirmation of a Chief Justice is a more important responsibility for the Senate than our action on any other nomination to any other Federal office. The Chief Justice of the United States is the highest symbol of America's commitment to the Constitution and the Bill of Rights. He is the ultimate protector of our freedoms and our system of equal justice under law.

The framers of the Constitution envisioned a major role for the Senate in the appointment of judges. The Virginia Plan, the original blueprint for the Constitution, gave the legislature sole authority for appointment of members of the judiciary. James Madison favored the selection of judges by the Senate. The provision ultimately adopted in the Constitution was a compromise described by Gouverneur Morris as giving the Senate the power "to appoint judges nominated to them by the President." As Professor Charles Black has written, the vote on this compromise:

> must have meant that those who wanted appointment by the Senate alone--and in some cases by the whole Congress—were satisfied that a compromise had been reached, and did not think the legislative part in the process had been reduced to the minimum. The whole process, to me, suggests the very reverse of the idea that the Senate is to have a confined role.

The Senate has a responsibility to scrutinize judicial nominees with special care, and the highest scrutiny should be reserved for the person nominated to be Chief Justice of the United States.

It is no accident that the Constitution speaks, not of the "Chief Justice of the Supreme Court," but of the "Chief Justice of the United States." As the language of the Constitution itself emphasizes, the Chief Justice is more than just the leader of the Court. He symbolizes the rule of law in our society; he speaks for the aspirations and beliefs of America as a Nation.

In this sense, the Chief Justice is the ultimate trustee of American liberty; when Congresses and Presidents go wrong under the Constitution, it is the responsibility of the Supreme Court to set them right. As first among equals among members of the Court, the Chief Justice is chiefly responsible for ensuring that the Court faithfully meets this fundamental responsibility.

Presidents and Congresses come and go, but Chief Justices are for life. In the 200 years of our history, there have been only 15 Chief Justices. The best of them, the greatest of them, have been those who applied the fundamental values of the Constitution fairly and generously to the changing spirit of their times.

With his famous dictum, "We must never forget that it is a constitution we are expounding," John Marshall shaped the Court in the early years and laid the groundwork for America to become a

Nation. Roger Taney failed the test and helped put the country on the path to Civil War. Charles Evans Hughes helped guide the country safely through its severest domestic test of modern times—the upheaval of the Great Depression. Earl Warren understood the central role of the Bill of Rights and its protections for the individual and helped guarantee that the civil rights revolution would pursue a peaceful path.

Two hundred years of history have given the Chief Justice a place in the affairs of our Nation not given to any other judge or justice. The Chief Justice's commitment to equal justice under law is particularly important because the Court is the last refuge for racial minorities, those with unpopular views and others outside the corridors of power who cannot look to the majority in society for protection of their rights.

Justice Rehnquist does not meet the high standards required for a Chief Justice. As a member of the Court, he has a consistent record of opposition to individual rights in cases involving minorities, women, children, and the poor. His views opposing the rights of individuals are so far outside the mainstream of even the Burger Court, that again and again, on vital issues such as racial desegregation, equal rights for women, and separation of church and state, Justice Rehnquist has stood alone in 8–1 decisions, with all the other Justices on the other side.

Justice Rehnquist's record on the Court and the record compiled in the Judiciary Committee's hearings contain overwhelming evidence of his intense lifelong hostility as a lawyer, public official, and member of the Supreme Court to claims for racial justice.

On the Court, Justice Rehnquist has been involved in two serious ethical breaches. One is his failure to recuse himself in the important case of *Laird* v. *Tatum*. Justice Rehnquist cast the deciding vote to uphold the government's policy of army surveillance of civilians, a policy which he had helped to develop while he was at the Justice Department. The second breach of ethics is his failure to inform his destitute brother-in-law of the existence of a trust which he prepared when he was in private practice. The brother-in-law was the beneficiary under the trust, and funds were wrongly withheld from him for more than 20 years.

Finally, Justice Rehnquist was not candid with the committee concerning numerous controversies raised during his confirmation hearings. For example, he denied that he harassed and intimidated voters in Arizona in the early 1960's, but the evidence is substantial that he did.

I. Insensitivity to Racial Minorities

1. The School Segregation Memo: Justice Rehnquist's entire legal career shows persistent insensitivity and hostility to the rights of minority citizens. As a law clerk for Justice Robert H. Jackson, he authored a memorandum defending *Plessy* v. *Ferguson*, the Supreme Court decision in 1896 that upheld racial segregation. The memorandum first came to light in December 1971, at the beginning of the final week of the Senate debate on Rehnquist's nomination to be an Associate Justice of the Supreme Court. Newsweek printed a memorandum written by Rehnquist, in the fall of 1952,

when he was a law clerk for Justice Robert Jackson. The memo, entitled "A Random Thought on the Segregation Cases," argued against the Court's intervening to end segregation in schools by overturning *Plessy* v. *Ferguson*. The memo concluded: "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues but I think *Plessy* v. *Ferguson* was right and should be reaffirmed."

On December 8, 1971, Mr. Rehnquist wrote a letter to Senator Eastland in which he said that the views expressed in the memo were not his own, but rather were prepared as "a statement of Justice Jackson's tentative views for his own use at conference," prepared at Jackson's request.

Justice Rehnquist has taken inconsistent positions on the school segregation memorandum. In his 1971 letter to Senator Eastland attempting to explain the school segregation memo, Rehnquist said, "I wish to state unequivocally that I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision."

However, in 1967, Mr. Rehnquist publicly challenged a plan to end de facto segregation of public schools in Phoenix. In a letter to the editor of the Phoenix Republic, Mr. Rehnquist stated, "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society." This statement, 13 years after *Brown*, is an alarming representation of Mr. Rehnquist's view of our society's obligations to its citizens. Mr. Rehnquist has never dissociated himself from this statement. Yet at least since the Supreme Court declared that "separate is inherently unequal," this Nation has not been neutral as between integration and segregation; it stands squarely against segregation.

And in a March 1983 article on Justice Rehnquist in the New York Times Magazine the author asked Justice Rehnquist whether his views on the *Brown* case had changed since his law clerk days. He replied, "I think they probably have", and said he now accepts *Brown* as the law of the land but added, "I think there was a perfectly reasonable argument the other way."

In his 1986 confirmation testimony, Justice Rehnquist repeated his statement that the memorandum reflected the views of Justice Jackson, not his own views. However, he also stated that he had no view at the time.

In addition to these contradictions, it is very difficult to accept the statement of Justice Rehnquist that one of the crucial sentences in the memorandum—"I have been excoriated by my liberal colleagues"—is a reference to other members of the Court excoriating Justice Jackson. Far more likely, it is Rehnquist the law clerk who was being excoriated by his co-clerks for defending segregation. In fact, Rehnquist has acknowledged defending the *Plessy* decision in lunchroom discussions with other law clerks at the Court.

Further, Justice Rehnquist supported his argument in 1971 by saying that the Plessy memo "differs sharply" from the normal memos submitted to Justice Jackson since Jackson did not want his clerks to give their own philosophical views of how a case should be decided. However, many other memos by Justice Rehnquist written while he was a clerk contain "philosophical" views of how cases should be decided.

Others have challenged Rehnquist's explanation. His co-clerk at the time, Donald Cronson, contradicts him. Cronson has said that the memo was more his than Rehnquist's. In "Simple Justice," the classic and exhaustive work by Richard Kluger in 1975 on school segregation and the *Brown* case, the author concluded that Rehnquist's account was not credible. Elsie Douglas, Justice Jackson's secretary for many years, told reporters in 1971 that Mr. Rehnquist's explanation was "incredible on its face" and that it "smeared the reputation of a great Justice." She restated her view in a letter dated August 8, 1986. Justice Jackson's biographer, Philip Kurland of the University of Chicago, said the arguments in the memo upholding the segregation doctrine were "inconsistent with other positions the Justice held."

2. Arizona Public Accommodations Ordinance: In 1964, while Congress was debating the Civil Rights Act, the Phoenix City Council was considering an ordinance which would prohibit racial discrimination in places of public accommodation. Rehnquist testified against the ordinance, which was passed unanimously by the City Council the next day. Rehnquist then wrote a letter to the editor of the Arizona Republic calling passage of the ordinance "a mistake." The letter equated the indignity suffered by a victim of discrimination barred from a lunch counter with the "indignity" suffered by the segregationist forced to serve a meal; the letter concluded:

> It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.

At his confirmation hearings in 1971, he stated that he has come to realize "the strong concern that minorities have for the recognition of these rights." It is regrettable that Mr. Rehnquist himself did not believe that equal rights for minorities are important. In response to my question at his recent confirmation hearings, Justice Rehnquist could not recall a single civil rights statute which he had supported on the public record.

3. Republican Ballot Security Program: Throughout the late 1950s and early 1960s, Mr. Rehnquist had a leadership role in the so-called Republican "ballot security" program in Phoenix, Arizona. This type of program is widely recognized as a means to discourage minority voters, many of whom vote for Democratic candidates. Several witnesses have testified that Mr. Rehnquist personally accosted would-be voters and questioned their eligibility to vote.

Mr. James Brosnahan, an assistant U.S. attorney in Arizona in 1962, testified that he visited a minority polling place in South Phoenix on election day in 1962, that he saw Rehnquist at the precinct and that others in the polling place pointed Rehnquist out as having engaged in challenging voters. He discussed the matter with Rehnquist, whose answers to Mr. Brosnahan's questions acknowledged that he had been engaged in challenging voters.

Dr. Sidney Smith testified that he was in a predominantly minority Phoenix polling place in 1960 or 1962, probably 1960. He saw Mr. Rehnquist drive up with one or two men and get out of the car. Mr. Rehnquist approached two black men in the line of voters and

held up a white card for them to read. He said: "You have no business being in this line trying to vote. I would ask you to leave."

Mr. Charles Pine testified that he was working out of Democratic county headquarters and received a complaint about someone intimidating voters at the Bethune polling place in 1962. When he arrived, an attorney identified the man engaged in challenging voters as Rehnquist. Mr. Pine saw the man identified as Rehnquist approaching voters, and asking, "Pardon me, are you a qualified voter?"

Senator Manuel Pena testified that in 1964 he was a volunteer for the Democratic party assigned to go to polling places and respond to complaints. When he arrived at the Butler precinct, he was told by the inspector that someone was challenging everyone who came in, slowing down the lines of voters. Pena had a lengthy conversation with this person and objected to these tactics. A few years later, he saw Rehnquist's picture in the newspaper and recognized him as the same man.

Mr. Melvin Mirkin testified that in 1960 or 1962 he saw Rehnquist at a polling place giving instructions to other Republican representatives. He stated that Rehnquist's statements were "purely for public consumption" and the people he was speaking to were "merely props."

These witnesses provide overwhelming evidence that Rehnquist was personally engaged in challenging and harassing voters during the early 1960's.

Other witnesses testified that they did not see Rehnquist challenging or intimidating voters. Their testimony is of limited, if any value, because none of them were with Rehnquist throughout the entire election day in 1960, 1962, or 1964. Senator Biden asked the entire group:

> Can you state categorically that he did not challenge anyone on that election day?
>
> Mr. George Randolph answered for the group: How could you answer that categorically when not one of us was with him all day?

Rehnquist himself admits that he spearheaded a type of program which has been widely discredited as designed to interfere with the rights of eligible, mostly minority voters, to cast their ballots.

Judge Charles L. Hardy, then of the Superior Court of Maricopa County, and now a Federal district judge, wrote a letter to the Senate Judiciary Committee in 1971 during the committee's consideration of Rehnquist to be an Associate Justice, in which he described the Republican ballot security program in 1962 as follows:

> In 1962, for the first time, the Republicans had challengers in all of the precincts in this county which had overwhelming Democratic registrations. At that time among the statutory grounds for challenging a person offering to vote were that he had not resided within the precinct for 30 days next preceding the election and that he was unable to read the Constitution of the United States in the English language. In each precinct the Republican challenger had the names of persons who were listed as regis-

> tered voters in that precinct but who apparently had not resided there for at least 30 days before the election. In precincts where there were large numbers of black or Mexican people, Republican challengers also challenged on the basis of the inability to read the Constitution of the United States in the English language. In some precincts every black or Mexican person was being challenged on this latter ground and it was quite clear that this type of challenging was a deliberate effort to slow down the voting so as to cause people awaiting their turn to vote to grow tired of waiting and leave without voting. In addition, there was a well organized campaign of outright harassment and intimidation to discourage persons from attempting to vote. In the black and brown areas, handbills were distributed warning persons that if they were not properly qualified to vote they would be prosecuted. There were squads of people taking photographs of voters standing in line waiting to vote and asking their names. There is no doubt in my mind that these tactics of harassment, intimidation and indiscriminate challenging were highly improper and violative of the spirit of free elections.

Judge Hardy's account of voter harassment in Phoenix in 1962 is confirmed by reports in the Arizona Republic of November 7, 1962, that voter-challenging by Republicans in predominately black and Hispanic precincts in South Phoenix obstructed the right to vote of citizens assigned to those precincts.

Similar difficulties characterized election day in Phoenix in 1964. On November 4, 1964, the Arizona Republic reported that:

> . . . substantial harassment of Democratic voters in several Phoenix precincts was reported to State Democratic Party leaders.
>
> Robert H. Allen, State Democratic chairman, said reports reaching his office indicated that the harassment consisted mainly of "indiscriminate mass challenging of voter residency." "Most of the harassment came from precincts with predominately Negro and Mexican American voter registration," said Allen.

In 1960, Rehnquist was designated by the County Republican Chairman as co-chairman of the ballot security program; he supervised and assisted in the preparation of envelopes mailed to Democrats—largely in black and Mexican-American districts—which were the foundation of residency challenges; he recruited lawyers to serve on a lawyer's committee; he advised challengers on the law; and he supervised in assembling returns of the mailings for challenging purposes.

In 1962, Rehnquist was designated chairman of the lawyer's committee of the county Republican Party, and he again taught challengers the procedures they were to use. And, as in 1960, he served as a troubleshooter—going to precincts at which disputes had arisen in order to help resolve them.

Finally, in 1964 Rehnquist was chairman of the Ballot Security Program, selected by the county Republican chairman. As such, he

had overall responsibility for mailing out envelopes, recruiting challengers and recruiting members of the lawyers' committee, and for speaking, or seeing that someone spoke, at a training session of challengers. In 1964 as well, Rehnquist was general counsel to the County Republican Committee.

Thus while Mr. Rehnquist has sought to disassociate himself from the tactics employed by the Republicans in 1962 and other years, he held a high and responsible position in the Republican Party's election day apparatus from at least 1960 to 1964, a period that saw very substantial harassment and intimidation of voters in minority group precincts.

4. Justice Rehnquist's decisions in race discrimination cases: As a member of the Supreme Court, Justice Rehnquist has been quick to seize on the slightest pretext to justify the denial of claims for racial justice:

—His lone dissent in the *Bob Jones University* case supported tax credits for segregated schools.

—In *Batson* v. *Kentucky,* his dissent supported the right of a prosecutor to prevent blacks and minorities from serving on a jury.

—In *Keyes* v. *School District No. 1, Denver, Colorado,* his dissent supported the view that segregation in one part of a school district does not justify a presumption of segregation throughout the district.

—In 33 cases during his 15 years on the Court, Rehnquist has voted in favor of a black complainant in a race discrimination case; 31 were unanimous decisions.

—In 14 race discrimination cases brought by or on behalf of blacks, Justice Rehnquist cast the deciding vote against the civil rights claimant every time.

—In 80 of the 83 cases in which members of the Court have disagreed about the interpretation or application of a modern civil rights statute, Justice Rehnquist joined the interpretation or application least favorable to minorities, women, the elderly, or the disabled. The majority of the Court adopted the position most favorable to the civil rights plaintiff in slightly less than one half of these cases.

These statistics reflect the position of a Justice with a longstanding and strongly held insensitivity to the rights of minority citizens. Rehnquist's words and actions throughout his career, including his decisions as a Justice, belie a commitment to equal justice under law for all citizens, and disqualify Justice Rehnquist from becoming Chief Justice.

II. Justice Rehnquist Is Outside the Mainstream of American Jurisprudence in Other Significant Areas

In his 15 years on the Supreme Court, Justice Rehnquist has compiled a record of consistent opposition to individual rights in all areas—minority rights, women's rights, religious liberty, rights of the poor, rights of aliens, and rights of children.

In 1975, Harvard Law Professor David Shapiro reviewed Justice Rehnquist's first 4 terms on the Court and reached the following conclusions:

> A review of all the cases in which Justice Rehnquist has taken part indicates that his votes are guided by three basic propositions:
>
> (1) Conflicts between an individual and the Government should, whenever possible, be resolved against the individual.
>
> (2) Conflicts between State and Federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the States; and
>
> (3) Questions of the exercise of Federal jurisdiction, whether on the district court, appellate court or Supreme Court level, should whenever possible, be resolved against such exercise.

Justice Rehnquist's record on individual rights is shocking. His votes in cases involving the rights of racial minorities are discussed in section I, supra. During Justice Rehnquist's tenure, the Court has decided 23 cases involving constitutional claims of sex discrimination. The majority of the Court voted with the claimant 14 times. Justice Rehnquist voted to uphold the challenged statute or practice in 20 of the 23 cases.

In cases involving claims of discrimination against legal aliens, Justice Rehnquist has voted to uphold the discriminatory statute in every one of the 12 in which he participated. The majority of Justices found the challenged statute unconstitutional in 8 of those cases. Justice Rehnquist would bar legal aliens from holding jobs ranging from architect to notary public.

In cases striking down statutes which provide that illegitimate children do not have the same rights as legitimate children, Justice Rehnquist has consistently voted to uphold the discriminatory statutes. Justice Rehnquist would deny disability insurance payments and worker's compensation benefits to illegitimate children.

Since Justice Rehnquist has been on the Court, it has decided 25 cases involving separation of church and state. In 13 of those cases, a majority of Justices held the challenged statute to be a violation of the first amendment prohibition on government sponsorship of religion. Justice Rehnquist voted to uphold the statute completely in 23 of the 25 cases, and voted to uphold part of the statute in the remaining 2 cases.

Of 30 cases involving claims of cruel and unusual punishment, the Court found a constitutional violation in 15. Justice Rehnquist found a constitutional violation in none of those cases.

Justice Rehnquist's pattern of denying individual rights is pervasive and flies in the face of the Court's critical role as protector of such rights. Perhaps the most telling illustration of Justice Rehnquist's unwavering commitment to uphold government action against challenge by an individual is his record in cases where he cast the deciding vote in a matter involving the constitutionality of government action. In 120 of 124 cases, Justice Rehnquist cast the deciding vote to reject the constitutional claim.

Imagine what America would be like if Justice Rehnquist had been Chief Justice and his cramped and narrow view of the Constitution had prevailed in the critical years since World War II.

The schools of America would still be segregated. Millions of citizens would be denied the right to vote under scandalous malapportionment laws. Women would be condemned to second-class status as second-class Americans. Courthouses would be closed to individual challenges against police brutality and executive abuse—closed even to the press. Government would embrace religion, and the wall of separation between church and state would be in ruins. State and local majorities would tell us what we can read, how to lead our private lives, whether to bear children, how to bring them up, what kinds of people we may become. Such a result would be a radical and unacceptable retreat from the protections Americans enjoy today, and our Constitution would be a lesser document in a lesser land.

III. It Was a Major Breach of Judicial Ethics for Justice Rehnquist To Participate in the Case of *Laird* v. *Tatum*

Soon after Justice Rehnquist became a member of the Court, he was guilty of a serious ethical breach in refusing to recuse himself in the case of *Laird* v. *Tatum*, in which he cast the deciding vote in favor of the Government. The public record indicates that as assistant attorney general in the Nixon Administration from 1969 to 1971, Rehnquist was heavily involved in the development of the policy of surveillance of civilians by the Army, the precise policy challenged by the plaintiffs in *Tatum*. The record of Assistant Attorney General Rehnquist's role in the formulation of the policy involved in *Tatum* is at odds with his sworn testimony on the subject. Further, Assistant Attorney General Rehnquist clearly had some knowledge of the disputed facts in the *Tatum* case itself. While the case was pending in the Federal court of appeals, he specifically expressed his opinion that the plaintiffs had a non-justiciable claim.

The plaintiffs in *Tatum* alleged that the Army and the Department of Defense had established a wide-ranging program of surveillance and infiltration of law-abiding, domestic organizations and that they maintained the information in computerized data banks and widely disseminated their intelligence reports to Federal, State and local civilian agencies as well as military offices. The plaintiffs claimed that they were the targets of the military's surveillance program, and that the program violated the first amendment.

1. The Applicable Ethical Standards: The only statute directly governing the recusal of Supreme Court justices is 28 USC 455. In 1972, section 455 provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

The American Bar Association's Code of Judicial Ethics, which replaced the Canons of Judicial Ethics, was made available to the

public in May 1972 and adopted by the ABA's House of Delegates on August 16, 1972. The relevant provisions of the code are Canons 2 and 3. Canon 2 provides:

> A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The commentary to this provision cautions that a judge must make every effort to avoid even the appearance of impropriety, because public confidence in the judiciary will be diminished due to improper conduct of judges.

Canon 3 provides detailed guidance for the disqualification of judges to carry out the broad purpose of Canon 2. In relevant part, Canon 3 states:

> A Judge Should Perform the Duties of His Office Impartially and Diligently
>
> * * * * * * *
>
> C. Disqualification
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

The commentary to this provision explains how it applies to a judge who was formerly a lawyer in a governmental agency:

> A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

The Reporter's Notes to the Code of Judicial Conduct also state that a judge should recuse himself if, in his former position as a government attorney, "his association with the matter in controversy leads to the conclusion that his impartiality might reasonably be questioned."

2. Assistant Attorney General Rehnquist's Role in Developing the Policy: The final report of the Select Committee to study governmental operations with respect to intelligence activities (the

Church committee) concluded that a formal decision specifically authorizing Army surveillance of civilian political activity was made in 1969.

The decision cited by the Church committee is the memorandum from Secretary of Defense Laird and Attorney General Mitchell to President Nixon, dated April 11, 1969, which embodied the administration's intelligence gathering policy to prevent civil disturbances in the nationwide protests against the Vietnam War. Former Army General Counsel Robert Jordan has testified that Rehnquist was the Justice Department official who prepared the first formal Justice Department draft of the civil disturbance plan intended for the President's approval. This plan contained the administration policy for Army surveillance of civilians. Between March 25 and April 11, 1969, when the memorandum was submitted to the White House, DOD and Justice Department officials conducted negotiations on the role of the Army in surveillance of civilians, with DOD seeking to minimize its role and officials at the Justice Department arguing for a greater role by the Army. These records indicate that Rehnquist was deeply involved from the beginning in the development of the administration's policy concerning military surveillance of civilians.

Senator Leahy asked Justice Rehnquist the following question at his confirmation hearing on July 30, 1986:

> Senator LEAHY. When you were in the Justice Department, did you have knowledge about the military's domestic surveillance policy?
>
> Justice REHNQUIST. I had—if you would consider information obtained in the course of preparing for the May Day demonstrations, which did involve some military activity. I suppose you would say yes.

Justice Rehnquist's implication that he only knew about military surveillance policy in connection with preparing for the May Day demonstrations in May 1971, does not seem credible given his deep involvement in developing the policy in the first place.

3. Assistant Attorney General Rehnquist's Testimony Before the Ervin Subcommittee: On March 9 and 17, 1971, Assistant Attorney General Rehnquist testified before Senator Ervin's Constitutional Rights Subcommittee on the subject of the Army surveillance program. In a key exchange with Senator Ervin, Rehnquist referred specifically to the pending case and stated his view that the claim made by the plaintiffs in *Laird* v. *Tatum* was non-justiciable:

> Mr. REHNQUIST. My only point of disagreement with you is to say whether as in the case of *Laird* v. *Tatum* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the government.

4. Assistant Attorney General Rehnquist's knowledge of the disputed facts in the Laird v. *Tatum case:* At his recent confirmation hearings, Justice Rehnquist denied that he had any knowledge of

the disputed evidentiary facts in *Laird* v. *Tatum*. Yet, in his testimony before the Ervin subcommittee in 1971, he had discussed a number of factual assertions which were disputed by the plaintiffs in *Tatum*, including that: (1) the Army had ceased its domestic intelligence program; (2) the Army's computer system was defunct; (3) no information had been transferred to the Justice Department; and (4) there was only one remaining printout. All of these allegations were disputed by the plaintiffs.

5. Justice Rehnquist Should Have Disqualified Himself in Laird v. *Tatum:* In reponse to a motion that he disqualify himself, Justice Rehnquist wrote an unprecedented 16-page memorandum denying the motion. In his memorandum, Justice Rehnquist dismissed the standard in the American Bar Association's Code of Judicial Conduct as not being "materially different" from the applicable Federal statute.

As even a cursory reading of the two standards quoted above reveals, the suggestion that the standards are similar is preposterous. The ABA standards, by their very language, go far beyond the statute by making the "appearance of justice" the relevant standard. In other words, even if a judge does not have a special interest in a case, has not been a material witness and is not related to a party or his attorney, he should still disqualify himself if "his impartiality might reasonably be questioned," for reasons including personal knowledge of disputed evidentiary facts or his former employment by a governmental agency. By equating the narrow language of 28 USC 455 with the broader ABA standards, Justice Rehnquist established an intellectually dishonest test for determining whether he should disqualify himself, and thus refused to disqualify himself.

His memorandum further compounds this breach of ethics by misrepresenting his role in formulating the policy for Army surveillance of civilians while he was at the Justice Department. Justice Rehnquist completely failed to address his key role in the Justice Department in establishing the policy. He dismissed his testimony about the disputed facts as merely a report of the existence and whereabouts of the Army's printout. He mischaracterized his testimony in the Ervin subcommittee that the case was non-justiciable as "a discussion of the applicable law."

In his book, "Appearance of Justice," John MacKenzie states that Justice Rehnquist should have disqualified himself in *Laird* v. *Tatum* and commented on his characterization of his testimony before the Ervin committee as follows:

> Justice Rehnquist called this exchange "a discussion of the applicable law." But this, as all lawyers will recognize and most lawyers will freely state, is not a mere discussion of the "applicable law." It is a statement of how the law should be applied to a particular case.
>
> Try as he might to restate the matter, Rehnquist judged the rights of parties after giving his view that one of the parties had no rights and after working to defeat that party's claim to rights.

If Justice Rehnquist had recused himself, as he should have, the decision of the court of appeals would have been affirmed, and the case would have been sent back to the trial court. Discovery would

have gone forward, and in the course of that discovery, the American people would have learned about the Huston plan, about the Army's surveillance of private citizens, and about the CIA's illegal domestic surveillance operations.

But Justice Rehnquist did not recuse himself. Instead, he participated in the case and cast the deciding vote in a 5–4 ruling that reversed the court of appeals decision and denied the plaintiffs' claims. He had already made up his mind about the issue and about the very case that raised the issue. This was no abstract constitutional question. He discussed the very case he later decided to rule on. He told Senator Ervin what he thought about the merits of the case, which was then in the court of appeals. He and the case arrived together in the Supreme Court. And he sat on the case as a Justice and cast the deciding vote.

One of the fundamental principles of our judicial system is that judges must be fair and impartial. Judges are not supposed to sit on cases when their minds are already made up. In *Laird* v. *Tatum*, Rehnquist was a committed advocate, not an impartial judge. He did not have an open mind, but a closed mind. As an assistant attorney general, he had been outraged by the Vietnam War dissenters. He detested their demonstrations in Washington. He made up his mind that they had no constitutional rights, even against the military surveillance that the Nixon administration was using to intimidate them.

A few months later, he was no longer an advocate, but a Justice, but the issue still rankled. He still resented the demonstrators, and now he had a chance to do something about them. He made up his mind that the demonstrators were not going to get their way in the Supreme Court, even if he had to sit on the case to break a tie vote, even if he had a to violate the ABA rules, judicial ethics, and the fundamental principles of justice to do it. He permitted his personal bias to interfere with his judicial oath—and then he covered up his breach of ethics with a misleading memorandum.

IV. The Cornell Trust

In 1961, Justice Rehnquist prepared a trust document to provide monetary benefits to his wife's brother, Mr. Harold Dickerson Cornell, who was suffering from multiple sclerosis. The trust was drawn up at the request of Justice Rehnquist's father-in-law, Dr. Harold Davis Cornell. Harold Dickerson Cornell has alleged that Justice Rehnquist and other members of the family concealed the existence of the trust from him for 20 years. As a result, Mr. Cornell alleges that he became poverty stricken as his health deteriorated. Further Mr. Cornell claims that Justice Rehnquist knew about his dire financial condition, yet never disclosed the existence of the trust. The trust document indicates that Mr. Rehnquist, through his wife, stood to gain personally from a failure to make the trust payments to Mr. Cornell.

Professor Geoffrey Hazard of Yale Law School, who compiled the American Bar Association's model rules of professional conduct, commented that, on these facts: "There would be a pretty good case in saying the lawyer in question had an obligation, if he knew the

person was destitute . . . to do something other than just keep quiet."

Stephen Gillers, Professor of Legal Ethics at New York University Law School, has stated that Rehnquist had a duty to act "because he had a surviving duty of loyalty to his client, and because fraud could have occurred given the length of time the trust went unreported. His failure to act when he personally stands to gain by the failure is especially wrong."

The Federal Bureau of Investigation conducted only a limited inquiry into this matter. On August 26, Senators Metzenbaum, Simon, Cranston and I requested a supplemental investigation by the FBI, which the attorney general has refused to conduct. If Mr. Cornell's statements are correct, and there is no reason to doubt they are, Justice Rehnquist is guilty of a serious breach of ethical standards.

The Cornell trust and *Laird* v. *Tatum* are particularly significant. They involve unethical conduct by Mr. Rehnquist while he was a sitting Justice, and they are unacceptable in a Chief Justice.

CONCLUSION

In the past, the Senate has not hesitated to oppose controversial presidential nominations to the office of Chief Justice. Before Rehnquist, 20 persons have been nominated to that high office, but only 15 have been confirmed. Most recently, in 1968, with the active encouragement of the current chairman of this committee, the Senate refused to invoke cloture on President Lyndon Johnson's nomination of Associate Justice Abe Fortas to be Chief Justice, and the nomination was withdrawn.

The Senate should not hesitate to do the same today. This institution is not a rubber stamp. We have our own independent responsibility to the Constitution, the Supreme Court and the judicial appointment process.

On the merits, Justice Rehnquist is not mainstream but too extreme—he is too extreme on race, too extreme on women's rights, too extreme on freedom of speech, too extreme on separation of church and state, too extreme to be Chief Justice.

Further, Justice Rehnquist did not hesitate to defy the fundamental principles of judicial ethics by participating—and casting the decisive vote—as an associate justice in a major Supreme Court case that challenged his own extremist actions as an assistant attorney general in fashioning the Nixon policy of military surveillance of civilians. And he engaged in an unusually cruel and unseemly violation of legal ethics by concealing a trust he had drafted for the benefit of the destitute and desperately ill brother of his wife.

Finally, Justice Rehnquist did not come clean with the committee in any area of major controversy; the committee record, including the testimony of numerous witnesses, is replete with serious challenges against his credibility.

In sum, Justice Rehnquist is outside the mainstream of American constitutional law and American values, and he does not deserve to be confirmed as Chief Justice of the United States.

EDWARD M. KENNEDY.

SUPPLEMENTAL VIEWS OF MR. METZENBAUM

I. Introduction

I oppose the nomination of Justice William H. Rehnquist to be Chief Justice of the United States. In doing so, I am fully aware of the gravity of opposing the President's choice as head of the judicial branch of government. However, the Constitution demands that Senators exercise independent judgment as to the fitness of a particular nominee for office.

In the case of this nomination, the stakes for the country are exceedingly high. A Chief Justice is first among equals on the highest court in the Nation. He or she will play an important role in formulating basic approaches to constitutional and statutory interpretation. A Chief Justice exercises important and unique responsibilities, including that of chief administrator of the judicial branch and, when he or she is in the majority, the power to choose which justice is responsible for writing particular opinions. A Chief Justice can use the prestige and leadership inherent in the office to guide the Court to a sound consensus in times of divisive and controversial decisions. Alternatively, he or she can polarize the Court by advancing positions too extreme to enable such a consensus to emerge. Finally, a Chief Justice serves as perhaps the most important national symbol of integrity and fidelity to the law.

II. Concerns About Credibility

In my view, the most disturbing issue which arose during the course of the hearings was that of Justice Rehnquist's credibility. In three separate areas, the record shows serious questions regarding Justice Rehnquist's candor and honesty with the Committee. It is extremely difficult to conclude that a sitting Supreme Court Justice has misled a committee of the Congress as well as the American people. I conclude that is the case here.

The record of the hearings raises questions about Justice Rehnquist's credibility in three major areas—his involvement in challenging and intimidating voters in Phoenix, Arizona, during the 1960's; his views regarding statements in a memorandum about the *Brown* v. *Board of Education* case; and his knowledge of a restrictive convenant applicable to his property in Vermont. I will discuss each of these issues in detail.

A. VOTER INTIMIDATION

The issue of Justice Rehnquist's participation in systematic harassment and intimidation of minority voters arose during the consideration of his nomination as Associate Justice in 1971. Several witnesses testified or submitted statements to the committee claiming that Justice Rehnquist had intimidated voters in the Phoenix

area in the 1960's. One of the principal complaints was that he "challenged" voters, that is, confronted them to demand proof of their voter eligibility or required them to prove their literacy by reading from a prepared text.

There is no doubt that this issue was not adequately investigated at the time of the 1971 confirmation hearings. A number of Senators, in fact, complained at the time that the Committee had not thoroughly investigated these charges:

> . . . It appears that the Committee lacks either the motivation or machinery to conduct the type of factfinding which is needed to uncover which side of this dispute is mistaken. (1971 Minority Report, p. 42)

At that time, several Senators also submitted written questions to Mr. Rehnquist after the conclusion of the hearings regarding his activities at polling places during the early 1960's. Justice Rehnquist responded that he was involved in election activities and that he did visit precincts on several occasions in 1960 and 1962. (1971 hearings, p. 460.) Justice Rehnquist was asked if he ever challenged voters. He responded in the following way:

> In none of these years (1958–68) did I personally engage in challenging the qualifications of any voters. (1971 hearings, p. 491)

He also stated in an affidavit submitted to the committee in 1971:

> I have not, either in the general election of 1964 or in any other election, at Bethune precinct or in any other precinct, either myself harassed or intimidated voters, or encouraged or approved the harassment or intimidation of voters by other persons. (1971 hearings, p. 489)

During the recent hearings, Justice Rehnquist repeated again and again that he never engaged in challenging or intimidating voters. There could be no mistake as to what the Committee wanted to know—Did he confront voters? Did he ask them about their qualifications? Were reports the Committee had received from persons alleging that he intimidated voters true? Each time he was asked, however, Justice Rehnquist denied that he had challenged voters and denied each specific alleged incident of voter harassment presented to him.

By the time of the hearing, many persons had come forward to say that they saw Justice Rehnquist challenge voters. In order to resolve the factual disputes raised by these claims, Senator Simon and I submitted a request that the FBI interview any person who had come forward to make a statement on this issue. The FBI did cooperate and interviewed many persons in the Arizona and California area. We also requested that these persons be called to testify before the Committee.

Ultimately, twelve witnesses testified before the Committee on August 1, 1986, regarding claims of voter challenging and harassment. The attached appendix sets out in detail the evidence presented by these witnesses as well as other statements subsequently presented to the Committee. All of the witnesses who testified as to

challenging or intimidating voters saw Justice Rehnquist at polling places in 1960 through 1964. These witnesses were certain about what they saw. None had anything to gain from testifying. I do not doubt the sincerity of the other witnesses who claimed Justice Rehnquist did not challenge voters. However, the weakness in the testimony of all these witnesses is that, as they admitted, they were not with Justice Rehnquist throughout the election days in 1960 through 1964. Their testimony is based on speculation that Justice Rehnquist would not have engaged in such conduct.

The record of the hearings contains overwhelming evidence that Justice Rehnquist was present at minority precincts on election days in 1960 through 1964 and that he personally challenged and intimidated voters, contrary to his statements to the Committee in 1971 and 1986.

If he had admitted those facts, I might still think his conduct was improper, but it could be evaluated in a much different context. However, he chose to deny repeatedly this conduct in the face of overwhelming evidence to the contrary. Consequently, the principal issue before the Senate is his candor, his forthrightness, and his honesty. I conclude that he misled the Committee by continuing to deny this conduct.

B. MEMORANDUM ON *BROWN* V. *BOARD OF EDUCATION*

Another major issue regarding Justice Rehnquist's credibility concerns his statements about a memorandum he prepared as a Supreme Court clerk in 1952. In the memorandum, he set out at some length an analysis of the *Brown* v. *Board of Education* case then pending before the Supreme Court. 347 U.S. 483 (1954). The *Brown* case presented a challenge to the legality of segregated public schools. In particular, the plaintiffs asked the Court to overturn its 1896 decision in *Plessy* v. *Ferguson*, which held that "separate but equal" facilities satisfied the 14th amendment's requirement for equal protection under the law. 163 U.S. 537 (1896).

The memorandum prepared by Justice Rehnquist strongly opposed overturning the doctrine of *Plessy* v. *Ferguson*. The conclusion of the memorandum states:

> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be re-affirmed.

In my view, the principal issue is not Justice Rehnquist's position on this case at that time. Although I would strongly disagree with such a position, I would not question his right, given the circumstances that existed at that time, to hold the view that *Plessy* should not be overturned.

My principal concern, rather, is that he insisted in his statements to the Senate in 1971 and again in 1986 that the views represented in the memorandum were not his, but those of the Justice he served as a clerk, Justice Robert Jackson. A review of the evidence shows clearly that this claim is not true.

First, the memo is simply not written as a summary of Justice Jackson's views. It is written in the first person with no reference

to any position Justice Jackson had taken in any case. It is much more likely that a memorandum, requested by Justice Jackson to reflect his own views, would refer to prior statements by the Justice or refer expressly to views as being held by Jackson.

Second, Justice Rehnquist's statements on his views of *Brown* v. *Board of Education* have been inconsistent. In 1971, Justice Rehnquist stated in a letter to the chairman of the Senate Judiciary Committee, Senator Eastland:

> The bald simplistic conclusion that "*Plessy* v. *Ferguson* was right and should be reaffirmed" is not an accurate statement of my own views at the time.

In 1986 he testified to the Committee:

> I do not think I reached a conclusion. (7/30, p. 84)

Justice Rehnquist's statement in 1971 was clearly intended to deflect criticism by indicating he agreed with the decision to overrule *Plessy* v. *Ferguson*. Not only is his statement in 1986 inconsistent with his 1971 statement, it is difficult to accept the idea that he did not have a view on the most important constitutional decision of the century. As described further below, Justice Rehnquist frequently defended the *Plessy* decision to his fellow clerks.

A third consideration is that the memorandum is entitled "A Random Thought on the Segregation Cases." It is highly questionable that a memorandum, intended to state the views of Justice Jackson, would be titled in such a way. On the other hand, the title is very consistent with Mr. Rehnquist setting out his own views for Justice Jackson's consideration.

Fourth, as discussed above, the memo ends by saying:

> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be reaffirmed.

If these are written as Justice Jackson's views, who are the "liberal" colleagues? Under Justice Rehnquist's interpretation of the memorandum, they would have to be other members of the Court. It is not credible that Justice Jackson was "excoriated" by other members of the Court for holding a sincere view regarding the *Brown* case or that Jackson viewed the reaction of his colleagues in this way. A much more reasonable assumption is that the "liberal" colleagues are Justice Rehnquist's own colleagues, his fellow clerks. As one of these clerks, Donald Cronson, recently said in an interview with the Washington Post:

> Unquestionably, in our luncheon meetings with the clerks, he (Rehnquist) did defend the view that *Plessy* was right.

Justice Rehnquist's perception of his fellow clerks is shown in an article he wrote in the December 13, 1957, issue of "U.S. News & World Report" a few years after he prepared the memorandum:

> Some of the tenants of the "liberal" point of view which commanded the sympathy of a majority of the clerks I knew were: extreme solicitude for the claims of Communists and other criminal defendants, expansion of Federal

> power at the expense of State power, great sympathy toward any government regulation of business—in short, the political philosophy now espoused by the Court under Chief Justice Earl Warren.

There is no doubt that Justice Rehnquist was frequently at odds with his fellow clerks and engaged in a vigorous defense of the *Plessy* decision to them. All of these circumstances point to the conclusion that the "liberal" colleagues referred to in the memorandum were Justice Rehnquist's fellow clerks.

There are other problems with Justice Rehnquist's explanation. He stated his memo was a draft of a statement for Justice Jackson to make at the Conference of the Justices, but Jackson was well-known for his ability to make eloquent spontaneous remarks. The first half of the memo is a gratuitous discussion of the history of Court decisions on property rights. It is highly unlikely Justice Jackson would have lectured his fellow justices about such elementary propositions when they were intimately familiar with this history. Justice Rehnquist argued that the memo could not represent his own views because Jackson did not "expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided." (See letter to Senator Eastland) yet his other memoranda prepared as a clerk contain frequent philosophical and personal observations about how he felt a case should be decided.

A final consideration is that Justice Jackson joined in the unanimous decision to overrule *Plessy* v. *Ferguson* and strike down the doctrine of "separate but equal." Thus, Jackson's views on the case were clearly not those reflected in the memorandum. When asked about this discrepancy, Justice Rehnquist testified that, even if Jackson supported the *Brown* decision when it was handed down, he did not hold that view when the justices first conferred about the case. (7/31, p. 142) However, the Notes of Justice Burton taken at the conference, show that Jackson supported overturning *Plessy* if it could be framed in the correct way. It is clear that Jackson was not flatly in favor of retaining the *Plessy* doctrine. (See Kluger, "Simple Justice," p. 609, 1986) Justice Jackson's clerk in the 1953 term also stated that Justice Jackson was prepared to support a Court decision ending segregation. (*Id.*)

The draft memorandum prepared for Justice Jackson prior to the issuance of the decision also showed that he was prepared to join in an order barring segregated schools. (*Id.*, p. 607) No other drafts or memos indicate Justice Jackson agreed with the statement: "I think *Plessy* v. *Ferguson* was right and should be reaffirmed."

The supporters of Justice Rehnquist's interpretation point to a letter from Justice Rehnquist's fellow clerk, Donald Cronson, to the Senate in 1971. That letter claimed that Justice Jackson asked for two memos, one supporting overturning the *Plessy* decision and the other supporting upholding it. Mr. Cronson has claimed that the memo signed by Justice Rehnquist, as well as a memo opposing the *Plessy* decision signed by Cronson, were both collaborative efforts requested by Justice Jackson.

This account does not withstand scrutiny for several reasons. Contrary to Cronson's account, Justice Rehnquist never mentioned a second memoraundum or that the Rehnquist memo was a col-

laborative effort. He has consistently described the memorandum as prepared only by him. Further doubt is raised that these memos were collaborative efforts because each memo is signed by only one clerk, and the styles are very different. In addition, the title of the Cronson memo, "A Few Expressed Prejudices on the Segregation Cases," like the Rehnquist memo, is much more consistent with a presentation of individual views of the clerk. Finally, Mr. Cronson's claim is that Justice Jackson asked for one memo supporting *Plessy* and another one opposing it. But Justice Rehnquist claimed that Justice Jackson favored reaffirming *Plessy* and wanted a statement favoring this position, not that he wanted arguments on both sides.

Richard Kluger, who wrote a careful analysis of the *Brown* decision in his book "Simple Justice," concludes:

> One finds a preponderance of evidence to suggest that the memorandum in question . . . was an accurate statement of his (meaning Justice Rehnquist's) own views on segregation; not those of Robert Jackson, who, by contrast, was a staunch libertarian and humanist. (p. 609).

On August 8, 1986, Elsie Douglas, Justice Jackson's personal secretary of 9 years, wrote to Senator Kennedy stating:

> It surprises me every time Justice Rehnquist represents what he said in 1971 that the views expressed in his 1952 memorandum concerning the segregation case then before the Court were those of Justice Jackson's rather than his own views. As I said in 1971 when this question first came up, that is a smear of a great man for whom I served as secretary for many years. Justice Jackson did not ask law clerks to express his views. He expressed his own and they expressed theirs. That's what happened in this instance.

The *Brown* case was the most important constitutional decision of this century. It is inconceivable that a person with such strong views as William Rehnquist would not have had a view regarding the correctness of the decision. Moreover, the issue of whether he has honestly stated his position regarding the case has become an important one because of the great concern expressed by a number of Senators in the 1971 confirmation process and the repeated questioning of Justice Rehnquist concerning this point in the recent hearings.

The evidence shows overwhelmingly that Justice Rehnquist was not straightforward with the Senate in 1971 or in 1986 in his statements about this memorandum. He led the Committee to believe that, at the time the memorandum was prepared, Justice Jackson favored retaining the doctrine of *Plessy* v. *Ferguson* while Justice Rehnquist's views were very different. The record shows the opposite conclusion to be correct.

C. RESTRICTIVE COVENANTS

On July 30th, when Justice Rehnquist appeared before the Committee, Senator Leahy asked him about a restrictive covenant in the deed to his Vermont home:

> Senator LEAHY. When did you purchase that?

Justice REHNQUIST. In 1974, I believe.

Senator LEAHY. Justice Rehnquist, I am told that you have a warranty deed . . . in the warranty deed there is this sentence: "No fee to the herein conveyed property shall be leased or sold to any member of the Hebrew race."

Are you aware of that covenant in your deed?

Justice REHNQUIST. Not at the time, Senator. I was advised of it a couple of days ago. (7/30, p. 186)

On August 4, 1986, an article appeared in the weekly newspaper, Legal Times, which revealed new information on the Vermont restrictive covenant. The article states that shortly before Justice Rehnquist purchased the Vermont property, he received two letters which apprised him of the existence of the restrictive covenant. One letter, dated June 24, 1974, recommended that Justice Rehnquist "examine closely the attached abstract copy of the deed of the main cottage property." An abstract of the deed, which set forth the language of the restrictive covenant, was attached to this letter. The other letter, dated July 2, 1974, states in the second paragraph that "the property is also subject to restrictions relative to use and ownership by members of the Hebrew race."

At 6 p.m. on August 4, 1986, the same day Legal Times published the article, a letter from Justice Rehnquist to Senator Thurmond was hand-delivered to the Committee. The letter was dated August 4, and it addressed the Vermont restrictive covenant. Justice Rehnquist stated in the letter that he reviewed his files "after the conclusion of his testimony" and found the letter of July 2, 1974 referring to the Vermont restrictive covenant. Justice Rehnquist stated that "while I do not doubt that I read the letter when I received it, I did not recall the letter or its contents when I testified last week."

These facts raise the clear question whether Justice Rehnquist testified truthfully before the Committee on this issue. He said to the Committee that he was not aware of the covenant at the time he purchased the property. Now, after the hearings have closed, and after the letters have been revealed, Justice Rehnquist has admitted that he read a letter, which contained a prominent reference to the restrictive covenant, at the time he purchased the property. Further, although Justice Rehnquist was told about the restrictive covenant several days before the hearing, he did not tell the Committee of the existence of this letter until late in the day of the publication of the Legal Times article.

In my view the issue is not simply whether Justice Rehnquist has a restrictive covenant applicable to his property. Many Americans have old, unenforceable covenants in the chain of title transfers and are completely unaware of them. In this case, two letters were sent to Justice Rehnquist at the time he purchased the property which did notify him of the restriction. Thus, it is difficult to accept the statement that he was not aware of the covenant at the time he purchased the property. As the Toledo Blade in an editorial of August 6, 1986 stated:

> It is one thing for an ordinary home buyer to be unaware of a restrictive covenant in a deed, although any ex-

perienced lawyer doing a title search would ordinarily point out such anomalies to a client. It is quite different for a lawyer as astute as Mr. Rehnquist to plead ignorance. Quite simply, it is not believable.

Second, I find his letter referring to a search of his files "after the conclusion of his testimony" to be disingenuous in view of the fact that the letter was sent to the Committee late on the day that the letters were publicly disclosed.

III. Participation in *Laird* v. *Tatum*

During the Committee's consideration of the nomination, a number of members of the Committee were concerned about the propriety of Justice Rehnquist's participation in *Laird* v. *Tatum*, 408 U.S. 1 (1972). In *Laird*, the lawfulness of military surveillance of civilians was challenged by private citizens who were the subject of surveillance. The plaintiffs claimed that the military had exceeded its proper role in engaging in spying on citizens engaged in peaceful protests and that this surveillance had chilled their first amendment rights of free speech and association.

The plaintiffs asked Justice Rehnquist to recuse himself on the basis of his testimony before a congressional committee on the subject of military surveillance. The record shows that Justice Rehnquist should not have participated in the case, and his doing so represented a serious breach of judicial ethics.

When Justice Rehnquist testified before the Committee, he was asked if he had knowledge of the involvement of the military's domestic surveillance policy when he worked in the Justice Department. His response was that his only knowledge of this policy was limited to information obtained in the course of preparing for the May Day demonstrations in 1971. However, information obtained by the Committee shows that Justice Rehnquist participated in the development of Federal policy regarding domestic surveillance by the military. This information casts serious doubts on the truthfulness of his statements to the Committee on this issue.

Participation in *Laird*

The *Laird* case was one of the most significant civil liberties cases ever to come before the Supreme Court. In *Laird*, the plaintiffs alleged that the military had become involved in spying on civilians engaging in peaceful demonstrations and that this surveillance had a chilling effect on the exercise of the plaintiffs' first amendment rights of free speech and association. In the district court, the plaintiffs sought to obtain information from the Government and to present their case in an evidentiary hearing. The district court denied these requests, but the court of appeals ruled that the plaintiffs were entitled to a hearing.

When the case came before the Supreme Court, it presented a number of crucial questions, including the question whether private citizens who claimed that excessive spying by the Government inhibited freedom of speech could seek relief from the courts even if they had not been criminally prosecuted. Justice Rehnquist participated in the case. By doing so, he cast the deciding vote, which

allowed the Government to prevail in a 5–4 decision. As a result, the court of appeals decision which had allowed the plaintiffs to proceed with their case was overturned, and the case was dismissed. The plaintiffs were denied the right to have an evidentiary hearing, and there was no public airing of the conduct of the Army or the claims that American citizens' first amendment rights had been stifled.

The plaintiffs had not believed that Justice Rehnquist would participate in the decision; they asked him to recuse himself and they asked the Court to vacate its opinion. They argued that Justice Rehnquist should disqualify himself because he had testified on the central issues in *Laird* when he was an Assistant Attorney General in the Justice Department. Moreover, his testimony had indicated that he had personal knowledge of the disputed evidence in the case.

Justice Rehnquist did not recuse himself. *See* 93 S. Ct. 7 (1972).

TESTIMONY ON MILITARY SURVEILLANCE

In 1971, Justice Rehnquist testified before the Subcommittee on Constitutional Rights of the Judiciary Committee on the subject of military surveillance. (See Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the United States Senate, 92d Cong., 1st Sess. on "Federal Data Banks, Computers, and the Bill of Rights.") Senator Ervin, who was chairman of the Subcommittee, questioned Mr. Rehnquist on the issue of military surveillance and whether it discouraged exercise of first amendment rights. In the course of that testimony, Justice Rehnquist stated:

> The function of gathering intelligence relating to civil disturbance, which was previously performed by the Army as well as the Department of Justice, has since been transferred to the Internal Security Division of the Justice Department. No information contained in the data base of the Army's now defunct computer system has been transferred to the Internal Security Division's data base. However, in connection with the case of *Tatum* v. *Laird* now pending in the U.S. Court of Appeals for the District of Columbia circuit, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed.

This statement by Justice Rehnquist indicated personal knowledge of some of the evidence in the case, including evidence that the Army had terminated their surveillance activities, that no computer files were retained, that no information from the Army's computers had been transferred to Justice, and that there was only one copy of the computer printouts retained. The plaintiffs disputed all these claims. In addition to his statement regarding the evidence, Justice Rehnquist also took a position on the central legal issue in the case. He stated to the Subcommittee:

> My . . . point of disagreement with you is to say whether as in the case of *Tatum* v. *Laird* that has been pending in the court of appeals here in the District of Columbia

> that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of the individuals on the part of the government.

In addition to this specific statement, Justice Rehnquist made a number of general statements arguing that first amendment rights of individuals were not chilled simply because the military engaged in surveillance of their activities. For example:

> Senator ERVIN. . . . Do you not concede that Government could very effectively stifle the exercise of first amendment freedoms by placing people who exercise their freedoms under surveillance?
>
> Mr. REHNQUIST. No, I don't think so, Senator. It may have a collateral effect such as that but certainly during the time when the Army was doing things of this nature, and apparently it was fairly generally known it was doing things of this nature, those activities didn't deter 200,000 or 250,000 people from coming to Washington on at least one or two occasions to express their first amendment rights by protesting the war policies of the President.
>
> * * * * * * *
>
> Senator ERVIN. Well there is also evidence here of photographers having been present at many rallies. Army intelligence agents pretending to be photographers were present at many rallies, took pictures of people, and then made inquiries to identify these people and made dossiers of them. Do you think that is an interference with constitutional rights?
>
> Mr. REHNQUIST. I do not, Senator . . . I don't think the gathering by itself, so long as it is a public activity, is of constitutional stature. (Hearings 861-2)

The key legal issue in the *Laird* case was whether the plaintiffs could present their claim even though there had been no criminal prosecution. Thus, Justice Rehnquist was the spokesman for the Government in stating that the courts could not hear such a claim. By a 5-4 decision, the Court agreed with Justice Rehnquist's position and dismissed the case.

The *Laird* case came before the Supreme Court in 1971 and was decided in 1972. At the time the case was decided, the canons of the American Bar Association stated:

> A judge should disqualify himself in a proceeding in which his *impartiality might reasonably be questioned*, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or *personal knowledge of disputed evidentiary facts concerning the proceeding* . . . [Emphasis added.]

Justice Rehnquist's participation in the *Laird* matter violated these canons in two ways. First, his comments regarding the status of the program conducted by the Army and computer files regarding civilian political activity demonstrated that he has personal

knowledge of disputed evidence in the case. Second, his comments on the central legal issues in the case show that he could not reasonably have been viewed as impartial. Moreover, information obtained recently shows that Justice Rehnquist was much more involved in the development of policy in this area than was known at the time the case was decided. Thus, the case against his participation is even stronger than that presented by the plaintiffs at that time.

INVOLVEMENT IN MILITARY SURVEILLANCE POLICY

When Justice Rehnquist appeared before the Committee during the confirmation hearings, Senator Leahy asked:

> When you were in the Justice Department, did you have knowledge about the military's domestic surveillance policy? (7/30, p. 197)

Justice Rehnquist responded:

> I had—if you would consider information obtained in the course of preparation for the May Day demonstrations, which did involve some military activity, I suppose you would say yes.

This statement is simply not credible in light of available evidence on Justice Rehnquist Justice Department activities. Justice Rehnquist's knowledge of, and involvement in domestic surveillance activities was substantially greater than he acknowledged when he testified before the Committee. As I describe further below, Justice Rehnquist was responsible for the preparation of a draft directive regarding the roles of the Army and the Justice Department in dealing with civil disturbances, including gathering intelligence information before any disturbance actually occurred. That draft directive specifically provided that the Army would be involved in domestic intelligence-gathering. In addition, the Office of Legal Counsel, under the supervision of Justice Rehnquist, was the unit of the Justice Department working with the Army to develop overall policy in this area.

In 1976, a Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities (the "Church committee") reviewed the history of the involvement of the military in domestic surveillance. The Committee report states:

> Not until 1969 was there a formal civilian decision specifically authorizing Army surveillance of civilian political activity. At that time, Attorney General John Mitchell and Secretary of Defense Melvin Laird considered the matter and over the objections of the Army General Counsel, decided that the Army would participate in intelligence collection concerning civil disturbances. The Army's collection plan was not rescinded until June 1970, after public exposure and congressional criticism. (Church Committee Final Report at 85. Book II.)

There is no doubt that the draft of this directive was prepared by, or under the supervision of, William Rehnquist. His name appears as the author of the document, and, as noted below, the

former General Counsel of the Army, Robert Jordan, has stated that the draft was prepared by William Rehnquist.

This document was furnished to the Committee by the Justice Department after the close of the 1986 hearings in response to a document request by a number of Senators. However, we have also learned that the memorandum was previously made public in the published hearings of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary which conducted hearings on military domestic surveillance activities in April 1974 (here in referred to as the Ervin hearings). In the course of those hearings, the Subcommittee received this draft directive, dated March 25, 1969, prepared by Justice Rehnquist who was then Assistant Attorney General for the Office of Legal Counsel. (Ervin hearings, p. 335) The memorandum proposed, for approval by the Secretary of Defense and the Attorney General, a plan for dealing with civil disturbances.

The draft directive draft outlined a plan which required the Departments of Defense and Justice to coordinate their preparations for and their responses to civil disturbances. The draft directive stated that the intelligence-gathering capability of the Federal Government, including military intelligence, should be utilized to accomplish the goals of the civil disturbance plan.

For example, the draft stated that one phase of the plan was to be:

> the period of civil disturbance planning and intelligence operations prior to outbreak of any civil disturbance. (*Id.* at 336)

It also stated:

> The Deputy Attorney General has already designated an intelligence evaluation committee consisting of four representatives from Justice and one from Army . . .
>
> The Attorney General will be responsible for collecting, analyzing, evaluating, and disseminating intelligence bearing upon the probability of any serious disturbance. The Federal Bureau of Investigation will be charged with the task of collecting raw intelligence and transmitting it on a timely basis to the Department of Defense. At the request of the Attorney General, the Department of the Army, through the U.S. Army Intelligence Command, may assist in this effort. (*Id.* at 337)

The draft directive, standing alone, indicates that Justice Rehnquist knew more about military domestic surveillance than he revealed to the Committee. Testimony and documents provided by Robert Jordan, General Counsel of the Army in 1969, to the Subcommittee on the Constitution during the 1974 hearings also show that Justice Rehnquist had more extensive involvement in the development of the policy of domestic surveillance by the military than he acknowledged to the Committee.

Mr. Jordan told the Constitution Subcommittee that in March of 1969, Richard Kliendienst and Mr. Jordan agreed "that we ought to have a formal memorandum in the civil disturbance field." (*Id.* at 296.) Jordan told the Committee that: "the initial drafts were co-

ordinated between my office and Assistant Attorney General Rehnquist and his staff." (*Id.* at 31).

In a memorandum prepared for the Subcommittee, Jordan stated that numerous meetings were held between Army and Justice Department staff before the plan was finalized in August of 1969. One of the most important issues was whether military intelligence ought to play a role in the civil disturbance intelligence business. (*Id.* at 296.) According to Jordan, there were numerous discussions of this issue. (*Id.* at 297.) While the initial draft plan prepared by the Army "sought to assign intelligence collection responsibilities to the Department of Justice," the Rehnquist draft directive approved a role for military intelligence, and the final plan contained ambiguous language on the proper role for military intelligence. (*Id.* at 326.)

He testified that there was a disagreement between the Army and Justice Department regarding the constitutional limitations on military involvement in domestic surveillance. (*Id.* at 30) Jordan noted that the Army sought a limited role in this area, but the Justice Department did not acquiesce. He stated to the Subcommittee:

> It should be clear that the Army recognized the sensitivity of military intelligence operations in the civil disturbance arena, and sought to shift the responsibility for at least the collection portion of such activities to the Department of Justice, but was unsuccessful in achieving Justice concurrence. (*Id.* at 326.)

Jordan also stated that other units in the Department, particularly the FBI, may have been responsible for pressing for language which was more permissive regarding the role of the military. (*Id.* at 31) Thus, it is possible that Justice Rehnquist and his staff advocated a more limited role for the military than others in the Department. The issue here, however, is not whether Justice Rehnquist was the leading advocate for domestic surveillance by the military or whether he was satisfied with a more limited role. The question is whether he was involved in the development of this policy, whether his statements to the Committee regarding his role were correct, and whether his participation in *Laird,* in light of these circumstances, was proper.

Jordan's testimony is valuable not only because it reveals the circumstances and negotiations leading to the adoption of the civil disturbance plan but also because it shows that the role of the military in domestic surveillance was one of the most controversial issues encountered during the formulation of the plan. It shows that Justice Rehnquist was involved in the development of the military surveillance policy as well as the Government's position regarding legal constraints on domestic military surveillance.

ANSWERS TO SENATOR MATHIAS

Senator Mathias sent written questions to Justice Rehnquist after the close of the hearings; these questions sought a response to the questions raised by Jordan's testimony and the draft directive. Some of these questions and responses were the following:

> Q: What was your personal role in the preparation of this document (the draft directive)?
>
> A: I have no recollection of my personal role in the preparation of this document.
>
> Q: With particular regard to the portion of the document concerning civil disturbance planning and intelligence operations prior to outbreak, what was your personal role in its preparation?
>
> A: I have no recollection of my personal role in the preparation of this document.

Senator Mathias also asked Justice Rehnquist about Robert Jordan's 1974 testimony on the role of Army in domestic surveillance. He asked whether:

> language . . . authorizing a domestic role for military intelligence first appeared in the March 25 draft prepared by your office and transmitted over your signature?

Justice Rehnquist answered:

> I have no recollection how the language referred to . . . first appeared in the draft.

Senator Mathias also asked whether Justice Rehnquist knew of or participated in the formulation of policy on the use of military to conduct domestic civilian surveillance.

Justice Rehnquist answered:

> I have no recollection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities.

It is very difficult to accept the proposition that Justice Rehnquist has no recollection of his involvement in this issue, given its great significance and the controversy that surrounded it both within the administration and outside the government.

CONCLUSION

Justice Rehnquist should not have participated in the decision of *Laird* v. *Tatum*. His decision to do so in the face of his personal knowledge of disputed evidentiary facts, his prior advocacy of the Government's position in the case, and his involvement in the development of the very policy challenged do not permit a reasonable person to conclude that he was impartial.

In addition to the question of his judicial ethics in participating in this case, serious credibility problems are presented by Justice Rehnquist's testimony before the Committee and by his written answers to Senator Mathias' questions. Justice Rehnquist said to the Committee that he had no knowledge of military domestic surveillance policy except "information obtained in the course of preparation for the May Day demonstrations." It is clear that his knowledge of policy concerning domestic surveillance by the military far exceeded that stemming from his role in preparing for May Day in the spring of 1971. In addition, it is difficult to accept that Justice

Rehnquist has no recollection of the draft directive, his role in its preparation, or his involvement in discussions of the policy.

Finally, even if it is possible to accept the proposition that Justice Rehnquist cannot now recall his participation in discussions of this policy, it is not credible that he could have failed to recall this matter when the *Laird* case came before him. His 1972 statement refusing to recuse himself makes no mention of his involvement in discussions of military surveillance policy even though this involvement was certainly relevant to his recusal decision.

Justice Rehnquist wrote an opinion explaining his reasons for participating in the *Laird* case. 93 S.Ct.7 (1972) That opinion fails to mention either his statement at the Ervin committee hearings on the central legal issue in the case or his involvement in the development of policy regarding domestic military surveillance. Thus, Justice Rehnquist failed to explain, or even to refer to, two of the most important factors weighing against his participation.

IV. Ethical Duties Regarding Trust

Serious questions have been raised regarding the conduct of Justice Rehnquist in connection with a trust prepared by him for the benefit of his brother-in-law, Harold Dickerson Cornell. Justice Rehnquist drew up the trust in 1961 at the request of Cornell's father-in-law, the father of Justice Rehnquist's wife. The trust provided that Cornell, who was stricken with multiple sclerosis, was to receive funds from the trust whenever "he was unable to provide for himself in the manner to which he was accustomed."

According to Mr. Cornell, he lived in poverty much of the period between 1961 and 1982. Yet he received no benefits from the trust and no member of the family ever disclosed the existence of the trust to him. He only learned of the trust in 1982 when the trustee, Cornell's brother, died. At that time, the lawyer for Cornell's sister told her that Cornell should be notified of the trust.

Mr. Cornell is now 73. He is bedridden from advancing multiple sclerosis. He states that he had to retire because of his illness at age 49. Previously, he had been earning about $50,000 per year as an attorney. After his retirement, he was forced to live off a very modest Social Security income of $96 per month. In an August 27, 1986, interview with National Public Radio [NPR], Mr. Cornell stated:

> [F]or a large stretch of that time I lived on $96 a month from Social Security. I wasn't eating regularly for at least a year. I was in financial straits and the whole family knew, that included Bill and Nan (Mrs. Rehnquist) who were there. My sister and Rehnquist.
>
> NPR. You had a family meeting over this?
>
> Cornell. We had a number of them, yeah. I told them what my circumstances were, and how I was living on stew and ate out of dog bowls and so forth and they thought that was funny.

Some of the family members have stated that the decision not to inform Mr. Cornell of the trust was consistent with their Father's wishes. (See New York Times, August 15, 1986.) However, the ex-

press terms of the trust instrument provided for benefits to Cornell whenever he "was unable to provide for himself in the manner to which he was accustomed." It seems clear that, subsequent to Mr. Cornell's retirement, his income fell below this level and, therefore, he should have been provided benefits under the express terms of the trust. Moreover, the failure to notify him of the existence of the trust prevented Cornell from challenging the way the trust was executed.

Cornell also responded to this argument in the interview with NPR:

> You can't be a spendthrift of the trust if the only money you get is what the trustee gives you. I've never been a spendthrift, but the story my sisters have brewed up—and the story of (my father) wanting it to be a secret, is a story they brewed up to protect their position.

Justice Rehnquist was not the trustee and was not responsible for releasing funds from the trust to Mr. Cornell, however, he did prepare the trust instrument and was, therefore, well-acquainted with its terms. According to Mr. Cornell, Justice Rehnquist was personally confronted by Cornell on more than one occasion and told of Cornell's desperate financial situation. The issue the Senate must decide is whether Justice Rehnquist had an ethical obligation to disclose the existence of the trust to Mr. Cornell and to take some steps to encourage the trustee to make funds available.

The first public report of the claims of Mr. Cornell appeared after the conclusion of Justice Rehnquist's testimony before the committee. At the request of Senator Cranston, the FBI initiated an investigation of this matter and submitted a report 2 days before the committee voted on the nomination on August 14. A review of the FBI report indicated that a number of fundamental questions remained unanswered, particularly whether Justice Rehnquist was aware of the financial circumstances of Mr. Cornell and whether he took any steps to encourage the trustee to provide benefits or to notify Mr. Cornell of the trust.

By letter of August 26, four Senators requested that the chairman of the committee to ask the FBI to answer certain unresolved questions within 1 week to enable the Senate to consider this issue in connection with the confirmation of Justice Rehnquist. The chairman declined to make this request and by letter of August 27, the same Senators made a direct request to the FBI to complete the investigation. The FBI has declined to conduct any further investigations. Consequently, we must make reasonable conclusions based on the evidence available.

Mr. Cornell's statements indicate that Justice Rehnquist was informed on more than one occasion that Cornell was living on a poverty-level income and was suffering from a severe illness. Consequently, it is clear that Justice Rehnquist must have known that Cornell was entitled to benefits under the trust. It can also be assumed that Justice Rehnquist was aware that Cornell did not know about the trust. An additional consideration is that the other brothers and sisters, including Justice Rehnquist's wife, stood to benefit financially if the trust benefits were not distributed to Cornell. The amount of potential benefits for each of the other broth-

ers and sisters was apparently a pro rata share of the balance remaining in the trust on Cornell's death—$25,000 plus the growth in this amount over 20 years.

Under these circumstances, some legal scholars have stated that the attorney who prepared the trust has an ethical responsibility to act in this situation. Professor Stephen Gillers, an expert in legal ethics at New York University, has stated Justice Rehnquist had a duty to act:

> because he had a surviving duty of loyalty to his client (the father-in-law) . . . (and) . . . because fraud could have occurred given the length of time the trust went unreported . . . his failure to act when he personally stands to gain by the failure is especially wrong. (New York Times, Aug. 15, 1986)

Professor Geoffrey Hazard of Yale Law School, who presided over the drafting of the American Bar Association's Model Rules of Professional Conduct, stated:

> there would be a pretty good case in saying that the lawyer in question had an obligation, if he knew the person was destitute . . . other than just keep quiet. (Newsday, August 3, 1986)

There is no doubt that Cornell's life was detrimentally affected by the failure to provide any trust benefits to him. Justice Rehnquist was not responsible for the execution of the trust. Further, he may have been reluctant to interfere in a decision by the other brothers and sisters to conceal the existence of the trust from Cornell. However, an ethical duty must supersede the inconvenience of family disagreements, particularly when a person suffers severely as a result of an attorney's failure to act.

V. Extremism and Hostility to Individual Rights Claims

When Justice Rehnquist was appointed to the Court in 1971, many people warned that he would be insensitive to individual rights claims. His record on the Court confirms that those fears were well founded. In 1975, a Harvard Law professor reviewed his record. At that time, the professor concluded that many of Justice Rehnquist's decisions are explained by a very simple rule—in a case involving a claim by an individual against the Government, Justice Rehnquist almost always sided with the Government. Shapiro, "Mr. Justice Rehnquist: A Preliminary View," 90 HARV. L. REV. 293, 294 (1976). A review of his record reveals the same pattern today.

In racial discrimination cases which present equal protection claims, he almost always finds the individual's claim unmeritorious. In gender discrimination cases which present equal protection claims, he almost always finds the individual's claim unmeritorious. In cases involving the equal protection claims of aliens, he uniformly rejects the claims of the individual. In cases involving claims of prisoners and parolees, he almost uniformly rejects the claims of the individual. In cases involving first amendment establishment clause cases, Justice Rehnquist almost always rejects the claim of the individual.

Not only does Justice Rehnquist overwhelmingly reject the claims of individuals based on the Constitution, but he articulates extreme positions in the course of his rejection. For example, in *Wallace* v. *Jaffree,* 105 S.Ct. 2479 (1985), the Court's most recent school prayer case, he was the only Justice to assert that the establishment clause did not require Government neutrality on religious issues. When the Court struck down statutes which prevented legal aliens from obtaining engineering and notary public licenses, Justice Rehnquist was the sole dissenter. *Examining Board* v. *Flores de Otero,* 426 U.S. 572 (1976); *Bernal* v. *Fainter,* 104 S. Ct. 2312 (1984).

He was the only Justice to reject the application of the free exercise clause to imprisoned convicts. *Cruz* v. *Beto,* 405 U.S. 319 (1972). He was the only Justice to dissent from a decision requiring notice and opportunity to be heard before permanent civil service workers may be terminated. *Cleveland* v. *Loudermill,* 105 S. Ct. 1487 (1985). He was the only Justice to conclude that the IRS could not deny tax exempt status to racially discriminatory private schools. *Bob Jones University* v. *U.S.,* 461 U.S. 574 (1983).

He was the only Justice to say that churches can be given discretionary governmental power. *Larkin v. Grendels's Den,* 459 U.S. 116 (1982). He was the only Justice to say that the state can deny nonresident indigents medical care. *Maricopa Hospital v. Maricopa County,* 415 U.S. 250 (1974). He was the only Justice to say that criminal trials can be closed to the public. *Carter v. Kentucky,* 450 U.S. 288 (1981).

He was the only Justice to say that an ACLU lawyer could be disciplined for telling a poor person that the ACLU provides free legal services. *In re Primus,* 436 U.S. 412 (1978)

He also dissented in the case of *Batson* v. *Kentucky,* 106 S. Ct. 1712 (1986), where the Court said that the racially discriminatory use of peremptory challenges undermined "public respect for our criminal justice system and the rule of law." (*Id.* at 1724.) Justice Rehnquist admitted that the use of challenges to insure a white jury in the trial of a black defendant was "undoubtedly crudely stereotypical." But he said "there is simply nothing unequal about the State using its peremptory challenges to strike blacks from the jury in cases involving black defendants so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defedants, and so on." (*Id.* at 1744.) This view amounts to condoning the intentional exclusion of jurors based solely on race. It is ludicrous to justify such officially-condoned discrimination by claiming that white jurors can be excluded just as black jurors.

Justice Rehnquist's record is troubling because it shows he recognizes an extremely narrow role for the Constitution in protecting individual liberties against the invasive hand of big Government. In approving a nominee for Chief Justice, the Senate must consider how the nominee, if confirmed, may affect fundamental constitutional values. I conclude that the confirmation of Justice Rehnquist may threaten these values, and that he is not an appropriate choice to lead the Court as Chief Justice of the United States.

APPENDIX—EVIDENCE REGARDING VOTER INTIMIDATION

BACKGROUND

There is no doubt that minority voters were the victims of systematic harassment and intimidation at polling places in the Phoenix area in the early 1960's. U.S. District Judge Charles L. Hardy was in charge of a Democratic advisory committee in Arizona in 1962. In 1971 he wrote the Chairman of the Judiciary Committee describing the tactics of the Republican Party in 1962:

> In 1962, for the first time, the Republicans had challengers in all of the precincts in this county which had overwhelming Democratic registrations. At that time among the statutory grounds for challenging a person offering to vote were that he had not resided within the precinct for 30 days next preceding the election and that he was unable to read the Constitution of the United States in the English language. In each precinct every black or Mexican person was being challenged on this latter ground and it was quite clear that this type of challenging was a deliberate effort to slow down the voting so as to cause people awaiting their turn to vote to grow tired of waiting and leave without voting. In addition, there was a well organized campaign of outright harassment and intimidation to discourage persons from attempting to vote. In the black and brown areas, handbills were distributed warning persons that if they were not properly qualified to vote they would be prosecuted. There were squads of people taking photographs of voters standing in line waiting to vote and asking for their names. There is no doubt in my mind that these tactics of harassment, intimidation and indiscriminate challenging were highly improper and violative of the spirit of free elections (1971 hearings, p. 486).

The intimidation was not limited to a single precinct or to a single year. In 1962, for example, Senator Hayden asked for an investigation of challenging practices in 7 South Phoenix precincts. (Arizona Republic, Nov. 7, 1962, p. 1.) Richard Kleindienst, then State GOP Chairman, said that 90 percent of 300 challengers operating in the Maricopa and Pima Counties in 1962 on election day were Republican. (*Id.*, p. 11) Again in 1964, the Arizona Republic reported complaints of harassment at 6 Phoenix precincts. The Democratic chairman complained of "indiscriminate mass challenging of voter residency" at 6 predominantly minority precincts. (Arizona Republic, Nov. 1, 1964, p. 1.) Even Mr. Ralph Staggs, Republican Chairman for Maricopa County in 1962 testified at the 1986 hearings that there were attempts by the Republican Party to impede the rights of minority voters in that county in 1962 (pp. 468–9). (Note: All transcript references for the 1986 hearings refer to the unedited transcript for August 1.)

One of the principal methods for intimidating voters in the early 1960's was the process of "challenging" voter qualifications. Arizona law provided that some forms of challenges to voters were permissible. There is no doubt, however, that the tactics of challengers

during this period far exceeded that authorized by law. Challenging was conducted indiscriminantly and with no reason to believe voters were not qualified. As a result, long lines were created at polling places. Persons who feared that they might be violating some law or who were unwilling to endure the long wait and embarrassment of being challenged left the line. The practical result of this scheme was to deprive citizens of their right to vote.

WITNESSES

The first witness to appear before the Committee was Mr. James Brosnahan, a senior partner in a San Francisco law firm. Brosnahan is a former U.S. attorney and a former assistant U.S. attorney in Phoenix.

Mr. Brosnahan was very clear and consistent in his testimony. In 1962, he was employed as an assistant U.S. attorney in Phoenix. On election day he was assigned to respond to complaints about harassment of voters at polling places in the Phoenix area. He visited a number of precincts that day, and at one predominantly minority precinct, he saw Justice Rehnquist. Brosnahan made clear in his testimony that he did not personally see Justice Rehnquist challenge voters. However, when he arrived at the polling place, Justice Rehnquist was there in the position of a challenger:

> At that polling place, I saw William Rehnquist, who was known to me as an attorney in the city of Phoenix. He was serving as a challenger of voters; that is to say, the conduct and the complaints had to do with his conduct (p. 152).
>
> People told me he was challenging, and he did not deny he was a challenger. At that time in 1962, he did not raise any question about credentials or any of that. He did not deny that (p. 162).

Brosnahan talked to Justice Rehnquist about complaints of harassment of voters and indiscriminate challenging. Justice Rehnquist admitted he had been challenging voters (PP. 205, 207). In addition, a number of those present at the polling place complained to Brosnahan about the way Justice Rehnquist had been challenging voters.

There was no mistake about Brosnahan's ability to recognize Justice Rehnquist. Brosnahan knew him as a person who was active in the legal community and had attended a bar association function with him.

Dr. Sydney Smith, a professor of psychology in La Jolla, California, testified that he saw Justice Rehnquist at a predominantly minority polling place in Phoenix in 1960 or 1962, probably 1960. He saw Justice Rehnquist arrive at the polling place in a car with one or two other men. Rehnquist approached two black men in a line of voters and said to them: "You have no business being in this line trying to vote. I would ask you to leave" (p. 306). As a result, the two men left the line.

Dr. Smith had nothing to gain from coming forward to give this testimony. As he put it, "I am here to keep from being shamed in the eyes of my children" (p. 361).

Mr. Charles Pine, a successful businessman in Phoenix, testified that he was working out of Democratic headquarters to respond to complaints of harassment of voters. He received a complaint about conduct at Bethune precinct. When he arrived at the polling place, the attorney who accompanied him identified the person who was involved in challenging voters as William Rehnquist. Mr. Pine then recognized Rehnquist himself because of his prominence in Phoenix. Pine testified that he saw Justice Rehnquist approaching voters, challenging their qualifications to vote.

Mr. Pine testified that as a result of these challenges, voters left the line. Pine described the incident in this way:

> . . . Mr. Rehnquist was approaching voters and saying, "pardon me, are you a qualified voter?" He gave them no explanation. None of his actions were based on any of the reasons in the parameters outlined by Senator DeConcini. I saw him with my own eyes approach a middleaged gentleman, arbitrarily in the line. (He) said pardon me, but in a very firm and authoritative voice (said), "are you a qualified voter?" (pp. 291–2)

Pine testified that the voter began searching his pockets for some documentation proving his right to vote. But, as Pine pointed out, there was no requirement that the voter have documentation on his person. Pine stated in an interview with national public radio that the person left the line as a result of this questioning. Pine testified that Mr. Rehnquist engaged in the same conduct a few minutes later. (p. 293). When he did, Pine called Democratic headquarters and complained to Ms. Frankie Archer, a Democratic party official. As discussed below, Ms. Archer has submitted an affidavit that she was called by Pine and told by him that William Rehnquist was unfairly challenging voters.

Manuel Pena, a State senator from New Mexico, also testified. He stated that he saw Justice Rehnquist at Butler polling place in 1964 after he received a complaint about harassment of voters there. (pp. 333–4). When he arrived at the polling place, he was told by the inspector that someone was slowing down the line by challenging everyone who entered the polling place. Pena had a lengthy conversation with this person and objected strongly to the practices. A few years later, he saw a picture of Justice Rehnquist and had no doubt it was the same person he had seen in the polling place. (p. 336).

Melvin Mirkin, an attorney in Phoenix, also testified before the committee. Mr. Mirkin had nothing to gain through his testimony and, in fact, stated that he supported Mr. Rehnquist's confirmation. He testified that he had not been politically active for 20 years and only appeared because the committee asked him to do so.

Mr. Mirkin stated that he saw Justice Rehnquist in a polling place in the early 1960's giving instructions to challengers at polling places. However, Mirkin stated that the statements were "purely for public consumption" (p. 277) and the people he was speaking to were "merely props" (p. 281). The real audience was minority voters and the real objective was to intimidate these voters, encourage them to leave the line, and give up their right to vote.

Mirkin was asked whether he agreed with Justice Rehnquist's statement that he had never "harassed or intimidated" voters. He answered: "I have already drawn a different conclusion from the same facts." (p. 290)

Seven other witnesses testified at the request of supporters of Justice Rehnquist. Five of these witnesses had been politically active with Justice Rehnquist when he participated in election activities in Arizona. In addition, one witness was Democratic chairman during part of the time period in which the alleged challenging and intimidating occurred. This group also included the police officer who investigated a particular incident at the Bethune precinct polling place in 1962.

The basic weakness in the testimony of all these witnesses is that they were not present with Justice Rehnquist all day at the times of the alleged challenging of voters. Essentially, the testimony of all these witnesses amounted to the claim that they do not believe that Justice Rehnquist would have challenged voters but they could not be sure.

All these witnesses were asked: "can you state categorically that Justice Rehnquist did not challenge anyone on that election day?" Mr. Randolph answered for the group:

"How could you answer that categorically when not one of us (was) with him all day?" (p. 474)

The proponents of Justice Rehnquist's confirmation have argued that the testimony regarding challenging and intimidating voters is based on mistaken identity. They say that this testimony really refers to one incident involving another man at Bethune precinct in 1962.

This argument is totally misplaced. There was an incident involving another man in 1962 at Bethune precinct, Mr. Wayne Bentson. According to the police report prepared at the time and other observers, there was a scuffle at Bethune polling place involving Mr. Bentson, a Republican challenger. Mr. Bentson was led away from the polling place by the police.

However, none of the 5 witnesses who testified about Justice Rehnquist's conduct referred to that incident at all in their testimony. None of them testified to a scuffle or to police taking someone away. Only one of the witnesses, Charles Pine, testified that he was certain the incident he saw occurred at Bethune precinct. Moreover, that incident occurred in 1964. In short, none of the witnesses alleged that Justice Rehnquist was involved in that incident at Bethune precinct in 1962.

Another argument by Justice Rehnquist's supporters is that the Democratic County Chairman, Mr. Vincent Maggiore, was present at Democratic headquarters in 1962 and that he never received a complaint about Justice Rehnquist. This argument is also irrelevant. None of the witnesses testified that they called Mr. Maggiore in 1962.

Mr. Brosnahan's 1962 investigation was on behalf of the U.S. Attorney's Office. He did not testify that he called Democratic headquarters. Dr. Smith testified that he probably saw Mr. Rehnquist in 1960. (p. 325). Charles Pine testified that he called Ms. Frankie Archer in Democratic headquarters. (p. 302). Pine also testified that he recalled the incident occurred in 1962. However, he also re-

called that he contacted Democratic headquarters located on Roosevelt Street (p. 301), and Mr. Maggiore testified that Pine must, therefore, have been referring to an incident in 1964. (p. 429) This fact and the affidavit submitted by Ms. Archer indicate that the incident described by Pine did occur in 1964. Finally, Senator Pena testified that he saw Justice Rehnquist challenging voters in 1964. (p. 333). None of these witnesses would have called Mr. Maggiore to report the incidents they described in their testimony.

Subsequent to the hearings, Ms. Frankie Archer submitted an affidavit to the committee. This affidavit has been made part of the record. Her affidavit states in part:

> I want to state that I was in charge of Maricopa County Democratic Hdqts. in Phoenix, Arizona on election day in 1964. I was called on the phone by Charles Pine to tell me voters were being challenged in several precincts in South Phoenix. I asked if it was anyone we knew and what they were doing. I was told it was William "Bill" Rehnquist for one. . . .
>
> I also was called by Tony Abrail and Manuel Pena. I was told by one of the attorneys it was William "Bill" Rehnquist and someone I did not know . . .
>
> . . . the former County Chairman Vince Maggiore was not present nor did he appear at any time, he was not active in any way. The statements I have made are true and I have nothing to gain by making these statements, but I think the truth is important.

An additional argument is that the police officer who investigated the scuffle incident was at Bethune Precinct in 1962 and was present at the polling place all day and did not see Justice Rehnquist. This point, even if true, is irrelevant because none of the witnesses testified that the incident they observed necessarily occurred at Bethune in 1962. However, the police officer was inside the polling place only about an hour in total (p. 477). He left the school grounds and only remained in the area of the school the rest of the day (p. 477).

Another argument is that Judge Charles Hardy, who was in charge of a Democratic advisory committee in 1962, stated in 1971 that Justice Rehnquist was not involved in challenging voters. (See p. 9 of 1971 report.) Judge Hardy stated that Justice Rehnquist was not involved in the incident that occurred at Bethune Precinct in 1962. As discussed above, there is no claim that Justice Rehnquist was involved in the scuffle that occured at Bethune.

Judge Hardy also stated in 1971 that "challenging voters was not a part of Mr. Rehnquist's role in 1962 or subsequent years . . . ." In fact, the evidence does indicate that Justice Rehnquist may not have been assigned as the official challenger at any particular polling place during these years. However, this fact is totally consistent with the conclusion that he visited a number of precincts during election day in these years and became involved in challenging and intimidating voters.

Finally, Judge Hardy recently stated to the Washington Post: "if someone said he (Rehnquist) was down there, I couldn't dispute that. I never saw him." (Washington Post, July 27, 1986.)

ADDITIONAL INFORMATION

Since the hearing, more information has come to light, which should be considered by the Senate. In addition to Ms. Archer's affidavit, two affidavits were submitted to the Committee and have been made part of the hearing record. An attorney in Phoenix, Ms. Ruth Finn, has submitted an affidavit which states:

> I am the widow of Herbert B. Finn, who practiced law in Phoenix . . . at some time in the early or mid 1960's, on election day, at about time for the polls to close or few minues thereafter, my husband received a phone call. . . . he told me that the call concerned black voters in a south side precinct. He explained that he was told that there were long lines of people waiting to vote who were being denied the right to vote.
>
> My husband then left the house and upon his return he referred to Bill Rehnquist's efforts to close the polls on the long lines of black voters. He stated that he had never seen such long lines at closing time.
>
> There was no possibility of mistaken identity. Phoenix was a smaller town during the voting line incident and I believe my husband knew all of his fellow practicing attorneys by sight.

The Committee has also received an affidavit from Susan B. Perkins. She states:

> On election day, 1964, I was a Democratic booth worker at Jackson precinct. Sometime in the early afternoon, a man came to the precinct and began challenging the right to vote of some voters. I remember telling people later that he acted like a "storm trooper."
>
> The polls were to close at 7:00 p.m., but by that time there was still a long line of voters waiting to vote.
>
> . . . the same man who had been there earlier came back and started telling people to go home—that it was too late to vote.
>
> I made a call to Mr. Herb Finn, a lawyer who had always helped us.
>
> He got there in a few minutes and had words with the man.
>
> I could tell Mr. Finn knew the man. He told him he was wrong and the people could vote.
>
> I didn't know who the man was then. But I knew I would never forget his face. When I saw his picture in the paper when he went to the Supreme Court, I saw that the man was William Rehnquist.

Ms. Perkins' affidavit shows the man she identified, and the man who caused her to call for help was Justice Rehnquist.

HOWARD M. METZENBAUM.

SUPPLEMENTAL VIEWS OF MR. LEAHY

The nomination of an individual to be the Chief Justice of the United States is the most important nomination any Senator must ever consider. The Constitution requires our advice and consent on judicial nominations, and it is a responsibility that we should carry out with the same solemnity with which we take our oath of office.

I gave the nomination of Justice William Rehnquist my closest scrutiny and most careful consideration. After analyzing Justice Rehnquist's writings, FBI reports, Justice Department documents and Committee hearing transcripts, and after reviewing notes of my personal impressions during the hearings, on August 14, during Judiciary Committee consideration of his nomination, I cast my vote against Justice Rehnquist. I did so with some personal regret because I know Justice Rehnquist and have high regard for him.

Justice Rehnquist has many qualities that I consider important for Chief Justice. Among these are his keen intellect and legal skills, and his considerable experience as an Associate Justice which gives him a great understanding of the working of the Court and an appreciation for the responsibilities of the Chief Justice. However, there are other, equally important qualities requisite to be Chief Justice, and it is in these areas—credibility, judgment, and sensitivity—that I believe Justice Rehnquist falls short of the standard we should employ.

At the outset, let me say that I do not believe that a nominee's philosophy should be the ultimate factor in carrying out our responsibility to advise and consent. As long as a nominee is otherwise qualified, philosophy should not be a consideration unless that philosophy undermines fundamental principles of constitutional law, or his or her adherence to ideological principles is so fervent that the nominee cannot judge impartially.

President Reagan, like any President, is entitled to appoint judges who share his philosophy. Indeed, Justice Rehnquist himself acknowledges that he very well may be the most conservative member of the Court. Yet the fact that Justice Rehnquist's ideology or judicial philosophy differs from my own played no part in my decision to vote against him.

Justice Rehnquist's ownership of property in Vermont was also explored in the hearings. The warranty deed on that property includes a restrictive covenant barring the sale of the property to "any member of the Hebrew race."

While I am disturbed that as a sitting Supreme Court Justice, Justice Rehnquist did not question the existence of this clause in the deed at the time he bought the property, there is not evidence in Justice Rehnquist's background that he is either racist or anti-semitic. I accept Justice Rehnquist's assurances that he finds the convenant repugnant, and that he will move expeditiously to have it removed from his deed.

I raised this issue during the hearings because the Chief Justice of the Supreme Court of the United States is the person who, perhaps more than any other, embodies our principles of justice. Because of that important role, I believe—and Justice Rehnquist agreed with me during his testimony—that it is vital that he avoid even the appearance of racial or religious hostility.

Another important issue raised during the Judiciary Committee hearings on the Rehnquist nomination was whether he participated in efforts to challenge minority voters in the early 1960's. Based on my observation of the witnesses and my review of the testimony, I believe that the memories of both Justice Rehnquist and of many of those who testified against him, are faulty.

I can understand the position of those of my colleagues who are convinced of Justice Rehnquist's participation in voter challenges and based their decisions on this point. I can appreciate the opinions of my colleagues who are equally convinced that Justice Rehnquist was not involved in this reprehensible activity. Without clear and convincing evidence, I felt that this issue could not form the basis for my decision on Justice Rehnquist's nomination.

The axis upon which my decision to vote against Justice Rehnquist's confirmation ultimately turned was his decision not to recuse himself in the Supreme Court's 1972 decision in *Laird* v. *Tatum*. That case involved a first amendment challenge to the Army's program of conducting domestic surveillance of persons engaged in lawful antiwar demonstrations. The Supreme Court ruled in a 5-4 decision that the facts underlying the case presented a non-justiciable controversy. 408 U.S. 1 (1972).

During my review of the testimony and the materials which have been submitted concerning this nomination, I kept coming back to Justice Rehnquist's participation in the *Laird* case. I was not only troubled by Justice Rehnquist's decision to sit on that case, but also by the testimony he gave in answer to my questions concerning *Laird* v. *Tatum*. In order to understand Justice Rehnquist's conduct and his testimony before the Committee, it is important to review the history of the Army's domestic surveillance program—the program which led to the *Laird* v. *Tatum* case.

The Army's domestic surveillance program began during the Johnson administration. It grew more as a result of the FBI's failure to provide accurate intelligence concerning the potential for riots in urban ghettos than from a lack of intelligence concerning antiwar protests. In 1967, Army personnel were called in to quell the Detroit riot. This was the first time in 25 years that Army troops were used to handle a civil disturbance.

Following that incident, Attorney General Clark created a working group in the Department of Justice under the direction of Deputy Attorney General Christopher to collect intelligence and plan for civil disturbances. Meetings were held to plan for potential incidents, to coordinate the Federal response, and to establish "rules of engagement" for the use of Army personnel. Personnel of the Department of the Army participated in this working group.

It was in this context that the Army began its domestic surveillance program which was first authorized by a Defense Department Directive in May 1968. Later, the emphasis of the program

shifted from urban violence to concern about potential antiwar demonstrations.

In 1969, when President Nixon's team came to Justice, Deputy Attorney General Kleindienst took over command of the working group. At that time, the Department of the Army sought specific civilian authorization for its role in civil disturbance planning and it sought to limit its role in domestic intelligence-gathering. After consultations between Defense and Justice, it was decided that a memorandum to the President from Attorney General Mitchell and Secretary Laird would be prepared. That memorandum would set out the parameters of the various agencies' roles with regard to civil disturbances.

The responsibility for preparing the memorandum was given jointly to the Office of General Counsel of the Department of the Army and the Office of Legal Counsel of the Department of Justice, then headed by William Rehnquist. On March 25, 1969, Mr. Rehnquist prepared the first formal Justice draft memorandum of a civil disturbance plan. It states in relevant part:

> The Attorney General will be responsible for collecting, analyzing, evaluating and disseminating intelligence bearing upon the probability of any serious disturbance. The Federal Bureau of Investigation will be charged with the task of collecting raw intelligence and transmitting it on a timely basis to the Department of Defense. At the request of the Attorney General, the Department of the Army, through the U.S. Army Intelligence Command, may assist in this effort. However, in order to preserve the salutary tradition of avoiding military intelligence activities in predominantly civilian matters, the *U.S. Army Intelligence Command should not ordinarily be used to collect intelligence activities of this sort.* (Emphasis added.)

The general counsel of the Army at that time, Robert E. Jordan III, later testified before the Senate Subcommittee on Constitutional Rights that the Army had problems with the Rehnquist draft. In a memorandum accompanying his 1974 testimony to Senator Ervin, Mr. Jordan wrote the Army "had suggested that the term 'should' should be changed to 'will' so that the memorandum would state forcefully that the Intelligence Command '*will* not ordinarily be used to collect intelligence of this sort.' " (Emphasis in the original.)

In spite of the Army's arguments, the final draft of the memorandum eliminates any restrictions on the Army's collection of raw intelligence. It states in relevant part, "Under the supervision of the Attorney General, raw intelligence data pertaining to civil disturbances will be acquired from such sources of the Government as may be available." In his 1974 testimony, Jordan stressed that those changes were made at the request of Deputy Attorney General Kleindienst. In a recent letter to my chief counsel, Mr. Jordan clarified how the change in the final memorandum came about and Mr. Rehnquist's role in the development of the final product. It states in relevant part:

> Some of the inquiries I have received from other sources suggested that Mr. Rehnquist might have been an advocate for increased military intelligence activities relating to civilians. That is certainly not my recollection. To the extent this issue is important, you should know that my recollection is that Mr. Rehnquist agreed in general with the Pentagon view that every effort should be made to reduce or eliminate the military intelligence role. Within the Department of Justice, the opponents of reducing the military intelligence role were, as I understand it, the representatives of the FBI, and Mr. Hoover in particular.

The point is not whether Justice Rehnquist argued in favor of more or less domestic surveillance by the Army as a policy matter. The point is that Justice Rehnquist, while Assistant Attorney General for the Office of Legal Counsel, was deeply involved in the development of the policy which was ultimately at issue in the *Laird* v. *Tatum* case.

I would note that these facts were not known to the plaintiffs in *Laird* at the time they asked Justice Rehnquist to recuse himself from the case. Their basis for seeking recusal was testimony which he gave before Senator Ervin's Subcommittee on Constitutional Rights in 1971. Again, it is important to understand the context of those hearings to fully appreciate the refusal of Justice Rehnquist to recuse himself in the *Laird* case.

Some information about the Army's domestic surveillance program had come out as a result of press articles and congressional inquiries in 1970. Included in that information was the fact that the Army had developed a data bank of potential subversives which was stored in a computer at Fort Holabird, MD, headquarters for the Army Intelligence Command.

Public exposure of the program and the Fort Holabird "blacklist" resulted in the filing of *Tatum* v. *Laird* in 1970 in the U.S. District Court for the District of Columbia. An appeal of a district court ruling in that case was pending at the time of the Ervin hearings. The topic of those hearings was government collection and computer storage of information about individual Americans. The focus of those hearings was the Army's domestic surveillance program.

Senator Ervin requested witnesses from both the Department of Defense and the Department of Justice. One of the Justice Department witnesses was Mr. Rehnquist who testified on the constitutional limits of the Government's collection of sensitive personal information about American citizens, especially with regard to the exercise of their first amendment rights. During the course of that testimony, Justice Rehnquist stated:

> The function of gathering intelligence relating to civil disturbances, which was previously performed by the Army as well as the Department of Justice, has since been transferred to the Internal Security Division of the Justice Department. No information contained in the data base of the Department of the Army's now defunct computer system has been transferred to the Internal Security Division's data base. However, in connection with the case of

> *Tatum* v. *Laird*, now pending in the U.S. Court of Appeals for the District of Columbia Circuit, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed.

In the same hearings, Justice Rehnquist went on to testify about a central legal question presented in the *Laird* case. The following exchange occurred between Senator Ervin and Mr. Rehnquist:

> Senator ERVIN. But you do take the position that the Army or the Justice Department can go out and place under surveillance people who are exercising their first amendment rights even though such action will tend to discourage people in the exercise of those rights?
>
> Mr. REHNQUIST. Well, to say that I say they can do it sounds either like I am advocating they do it or that Congress can't prevent it or that Congress has authorized it, none of which propositions do I agree with.
>
> My only point of disagreement with you is to say whether, as in the case of *Tatum* v. *Laird* that has been pending in the Court of Appeals here in the District of Columbia, that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

These two statements formed the basis for the plaintiffs' motion seeking recusal of Justice Rehnquist in *Laird* v. *Tatum*. As I stated earlier, at the time the recusal motion was made, the plaintiffs were not aware of Justice Rehnquist's important role in developing the policy which underlay the Army's surveillance program.

Furthermore, they were not aware of Mr. Rehnquist's role in advising the Defense Department on what information could or could not be provided to the Ervin committee concerning the Army's domestic surveillance program. Recently we have received a memorandum for the record, written by Robert Jordan on February 23, 1971. This memorandum describes the Defense Department strategy for dealing with the then upcoming Ervin hearings, and the role of then Assistant Attorney General Rehnquist in advising the Defense Department on its witnesses' participation in those hearings. It states in relevant part:

> The objective of Fred's [J. Fred Buzhardt, General Counsel, Department of Defense] negotiations has been to avoid the presence of any military personnel as witnesses at the hearings. Apparently, OSD with the approval of Justice plans to take a pretty hard line in refusing the committee information on internal discussions and the like. Fred made reference to an opinion from Bill Rehnquist, Assistant Attorney General, Office of Legal Counsel, on what can be released. There will be problems with the committee asking questions which cannot be answered without violating Mr. Rehnquist's guidelines. I will be the biggest problem here, because I have been around for a long time,

and have participated in a large number of internal discussions.

In addition to the foregoing testimony at the hearing and advice to the Departments of Justice and Defense, Mr. Rehnquist played one other role during the course of the Ervin hearings. He sent a letter authorizing one of Senator Ervin's staff members to review the printout of the information which had been stored in the Fort Holabird computer. This printout included codes about the alleged subversive activities of the people who were under Army surveillance—a list, it should be noted, which included many distinguished military personnel. It seems highly unlikely that Mr. Rehnquist would have authorized congressional review without knowing what information was contained in the printout.

In summary, Mr. Rehnquist participated in the formulation of the policy which for the first time gave civilian authorization to the Army's domestic surveillance program. He testified concerning important and disputed facts about the scope and continued existence of the domestic surveillance program—he testified that the Army had terminated its surveillance program, that it had destroyed the data stored in the computer at Fort Holabird, that only one copy of the computer printout was retained and that no information had been transferred to the Department of Justice Internal Security Division's data base. He advised the Department of Defense about the scope of its testimony concerning the domestic surveillance program. He authorized congressional access to a key document which established the scope and contours of the domestic surveillance program. He gave testimony concerning his legal opinion as to whether the specific case of *Laird* v. *Tatum* raised a justiciable controversy.

Then, little more than one year after most of these events occurred, Justice Rehnquist was faced with a decision to sit on the *Laird* case. He cast the deciding vote in favor of the position he had previously testified to before the Ervin Committee. He cast the deciding vote for an opinion authored by Chief Justice Burger which adopted the version of the facts testified to by Mr. Rehnquist, but which were hotly contested by the plaintiffs in *Laird.* He cast the deciding vote in favor of a position which denied plaintiffs the opportunity to take discovery on the factual questions he had previously testified to. He cast the deciding vote in favor of a position which resulted in keeping the internal discussions of the Army surveillance program which went on in the Department of Defense from coming to public light—a position he previously counseled the Defense Department to take.

Justice Rehnquist decided to sit on the *Laird* case and wrote a memorandum opinion which took the narrowest view of the applicable statute. His opinion boils down to the fact that since he did not serve as counsel to the Government in the actual case of *Laird* v. *Tatum* in the lower courts, he could therefore sit on the case as a member of the Supreme Court. It is interesting and instructive to read his memorandum opinion in light of the facts that we now know and which had to be known to Justice Rehnquist at the time. I urge every member of the Senate to do so.

It might be easy for some of my colleagues to write off this breach of judicial ethics as merely a mistake made long ago. But today, Justice Rehnquist says it was no mistake.

His answers to questions about *Laird* and his role and knowledge of the Army surveillance program were vague, and at times misleading.

I asked him whether he would have done things differently in retrospect. He said, "I never thought of it again until these hearings, to tell the truth."

Senator Mathias asked him in a written question what his personal role was in the development of the March 25, 1969 memo. His answer was "I have no recollection of my personal role in the preparation of this document."

I asked him did he have any knowledge of the Army's domestic surveillance policy. His answer was, "I had—if you would consider information obtained in the course of preparing for the May Day demonstrations, which did involve some military activities, I suppose you would say yes."

Finally, I asked him did he have any knowledge of the evidentiary facts at issue in the *Laird* case. His answer was simple. It was "no."

But the facts presented to the Senate suggest an equally simple answer. It is yes, he did know.

All of this information, taken together, raises so many substantial questions about his ethical judgment, his sensitivity to the appearance of impropriety, and his credibility during his confirmation hearings, that I cannot cast my vote in favor of Justice Rehnquist.

CONCLUSION

Each member of the Senate now will have to examine the hearing record and the evidence which has come to light since the hearings. There are two decisions possible—to vote for Justice Rehnquist's confirmation or against it. Yet, as the statements of the Senators during Judiciary Committee consideration of the nomination demonstrate, even among those who come to the same conclusion on how they should vote, there is no one compelling reason that unites, no agreement as to what tips the scale.

This is as it should be. We are 100 different Senators. We each have taken an oath to uphold the Constitution. We each have an individual duty to sift through the facts and make our very best judgments. What is clear is that we are not a rubber stamp for a Presidential nomination, just as we are not a vigilante force against a nomination.

I have set forth the reasons for my vote against Justice Rehnquist's confirmation. The reasons are compelling to me. Others will perhaps find them equally compelling, or not significant, or will find something else that makes the picture clear for them.

I vote only as one Senator, but Justice Rehnquist will not be confirmed with my vote.

PATRICK J. LEAHY.

SUPPLEMENTAL VIEWS OF MR. SIMON

Few votes that I cast on this Committee will equal the importance of my vote on Justice Rehnquist nomination to the Supreme Court.

I entered the hearings inclined to confirm this nominee. Now that the evidence has been presented and weighed, I have made my decision.

The two basic questions are: Will this nominee fulfill the responsibilities well? Will this nominee be better than someone else the President might name?

In reaching these decisions, at the Supreme Court, level consideration of political philosophy is not only in order, it is required, if we are to take our responsibilities seriously. William Rehnquist wrote in the Harvard Law Record in 1959:

> Until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

The future Supreme Court Justice was correct.

In the case of Justice Rehnquist he clearly has the capability to continue as a top legal scholar, and I have no question about his ability to administer the Court as its Chief Justice.

I have serious reservations about his ability to fulfill the role of the symbol of justice for all of our people. His record on civil rights and civil liberties going back long before his years on the Court is not strong. His vision of the law alienates large numbers of Americans.

I ask myself the question: Will this nominee be better then someone else the President might name? The reality is that any member of the Court can fulfill the role of Chief Justice as the symbol of justice for all the people better than Justice Rehnquist can.

I oppose his nomination, recognizing the strong probability that he will be approved. If that happens, I hope he will understand the added symbolic responsibilities of his new role.

PAUL SIMON.